Supreme Court, U. S.
FILED
APR 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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LOUIS ARADO, ET AL.,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Louis Arado and the other intervening defendants, respectfully pray that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois is reported at 411 F. Supp. 218 (1976). The opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported, and is reproduced herein as Appendix A. An earlier interlocutory appeal in this case was decided *sub nomine United States* v. *City of Chicago*, at 534 F. 2d 708 (7th Cir. 1976), reviewing the district court's memorandum decision of April 21, 1975, reported at 395

F. Supp. 329 (N. D. Ill. 1975). The district court's still earlier preliminary injunction order is reported at 385 F. Supp. 543 (N. D. Ill. 1974).

JURISDICTION.

The court of appeals entered its judgment on January 11, 1977. This Court has jurisdiction under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Whether either Title VII of the Civil Rights Act of 1964 or the Constitution authorizes a federal district court to order an agency of state government to engage in racial quota hiring, absent proof of purposeful racial discrimination?

2. Whether Congress authorized the use of racial or ethnic quotas under Title VII of the Civil Rights Act of 1964 as a remedy for unlawful discrimination?

3. Whether the district court's use of the guidelines of the Equal Employment Opportunity Commission establishes a rule that mere disproportion in the performance of black and white police officers taking a promotional examination is conclusively and irrebuttably presumptive of unlawful discrimination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> • • • • •
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Section 703 of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> "(a) Employer Practices.
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> • • • • •
>
> (j) Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or precentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . , in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area." (42 U. S. C. § 2000e-2 (1970).)

STATEMENT.

This case consolidates a number of originally separate actions which challenged, on constitutional and statutory grounds, various employment practices of the Chicago police department. The third of those suits was brought in August, 1973, by the United States, under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e *et seq.* It alleged patterns and practices which discriminated against blacks, Hispanics, and women in hiring, assignment, promotion, and discipline. It is in the third case, and in that case alone, that petitioners intervened as parties-defendant.

A hearing was held in May, 1974, on plaintiffs' motion for a preliminary injunction. Immediately prior thereto, Louis Arado and other incumbent police officers, who had earned high-priority positions on the then-current sergeants' promotional eligibility roster, were allowed to intervene as defendants, because the means by which officers were qualified for entry on this roster was attacked as invalid by the United States in its lawsuit. Arado and the other members of his class are the petitioners herein.

The sergeants' eligibility roster at issue in the May, 1974, hearing was filled according to three criteria developed with LEAA approval: (1) an applicant's seniority; (2) his efficiency rating in his past and current police work; and (3) the results of a written sergeants' examination, devised and periodically administered by the Chicago Civil Service Commission pursuant to Illinois law. The examination was prepared in conformity with LEAA standards. The examination administered in 1973 is the one at issue herein, and is set forth as Appendix B hereto.

In November, 1974, the district court handed down a preliminary injunction order which included findings of fact based on the hearing. The court determined, among other things, that the City of Chicago had discriminated in promotion practices. One foundation for this finding was that the city placed significant reliance on the results of the 1973 sergeants' examination in deciding whom to promote. The court preliminarily enjoined any further promotions from eligibility rosters whose composition was based on the 1973 examination.

On March 10, 1975, trial on the merits of the consolidated cases was begun in the United States District Court for the Northern District of Illinois. On January 5, 1976, the court handed down a memorandum decision, generally reiterating the findings of discrimination in promotion that it had made in its November, 1974, preliminary injunction order. (385 F. Supp.

543.) One month later, on February 2, 1976, the district court made its preliminary injunction permanent with respect, *inter alia*, to sergeants' promotions, and further established a racial and ethnic quota for sergeants' promotions thereafter. The district court ordered that, however chosen, forty percent of new promotions to sergeant be either black or Hispanic. The city was allowed, but not required, to make use of persons on the 1973 eligibility roster in making its non-quota promotions.

On January 11, 1977, the United States Court of Appeals for the Seventh Circuit affirmed this decision. It said:

> We hold that the district court did not abuse its discretion in imposing mandatory quotas upon the Police Department. Under Title VII Congress has equipped the courts with wide discretionary power to remedy statutory violations by fashioning the most complete relief possible. . . . The district court had a duty to construct a remedy that would both eradicate as far as possible the past effects of discrimination and prevent discrimination in the future. (App. A at 31.)

The court of appeals also held, however, that,

> [t]here is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination. The Department merely followed the command of Illinois law in administering tests which on their face were racially neutral. When the district court stated that the City knowingly engaged in racial discrimination, it may have been referring to the fact that the Department must have been aware of the racially disproportionate impact of those examinations. Under *Washington* [v. *Davis*, 426 U. S. 229 (1976)], this is not enough to show intent for purposes of the equal protection clause. . . . Accordingly, we hold that the hiring and promotion policies of the Chicago Police Department did not violate the Constitution. (App. A at 30.)

Both lower courts found discrimination in the sergeants' examination solely because of performance differences between

black and white examinees; a greater proportion of white officers than of black officers taking the examination passed with a high score. The applicable seniority standards and efficiency ratings were not found to be discriminatory. (App. A at 17, n. 12.) Although petitioners presented evidence that the examination was both construct-valid and content-valid according to the existing norms of professional testing, this evidence was rejected on the ground that the validation procedures followed by the city were inadequate under the testing guidelines of the Equal Employment Opportunity Commission. Both lower courts accorded to those guidelines the force and effect of law. The examination itself, as this Court will observe, contains virtually no matter other than questions concerning proper police procedures.

REASONS FOR GRANTING THE WRIT.

This case presents three constitutional questions which, by virtue of the great number of cases in the federal courts to which the questions are relevant, are of extraordinary importance. This first is whether a finding of unlawful employment practices under Title VII of the Civil Rights Act of 1964 may be sustained as to an agency of state government without proof of purposefully discriminatory acts.* The second is whether, assuming that some act prohibited under Title VII has been proved, the imposition by a district court of mandatory racial quotas is a permissible remedy. The third is whether the courts can create an essentially conclusive presumption of discrimination by faulting defendants' failure to comply with E. E. O. C. guidelines for "validating" examinations which are impossible to meet.

1. Title VII of the Civil Rights Act of 1964, as originally enacted, did not apply to state and municipal government employers; applicability of these provisions to the states came only in the Equal Employment Opportunity Act of 1972, 42 U. S. C.

* This question is now before the Court in *Hazelwood School District* v. *United States*, No. 76-255, *certiorari granted* 45 U. S. L. W. 3463 (January 10, 1977).

§ 2000(d) and (e). This extension of the Civil Rights Act does not expressly state that public and private employers should be subject to different substantive standards under Title VII. Nevertheless, this conclusion unavoidably emerges from interpreting the statute in the light of *National League of Cities* v. *Usery*, 426 U. S. 833 (1976).

The Civil Rights Act of 1964 generally rests on two constitutional bases—the Commerce Power of Art. I, § 8 of the Constitution, and § 5 of the Fourteenth Amendment. The breadth of Congress' power under the Commerce Clause is, of course, great. See *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964). Nevertheless, as a matter of federalism under the Tenth Amendment, this Court has made it clear that the Commerce Power does not reach the terms and conditions on which state governments hire, promote, and compensate their employees. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), *overruling Maryland* v. *Wirtz*, 392 U. S. 183 (1968). It follows, accordingly, that Section 5 of the Fourteenth Amendment must be the basis, and the only possible constitutional basis, on which to rest the extension of the terms of Title VII to state and local government pursuant to the Equal Employment Opportunity Act of 1972.

Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In order to determine the meaning of Title VII as applied to state government, it is therefore necessary to inquire what substantive rights are protected by the Fourteenth Amendment and, in particular, Section 1 thereof. Last Term, in *Washington* v. *Davis*, 426 U. S. 229 (1976), this Court made it clear that "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U. S. at 240. And while the Court did not insist that "the necessary discriminatory racial purpose must

be express or appear on the face of the statute," 426 U. S. at 241, it did declare that mere evidence of race-linked disparities in examination performance does not, in itself, establish a *prima facie* constitutional violation. Again, this Term, the Court stressed that differential racial impact is not in itself proof of a constitutionally-prohibited discrimination. *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, ... U. S. ....., 45 U. S. L. W. 4073 (January 11, 1977).

These holdings have a singular importance in this case, for here it cannot be argued that *any* racially motivated purpose—whether overt or covert—was present. The Court of Appeals for the Seventh Circuit so held:

> There is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination. . . . Accordingly we hold that the hiring and promotion policies of the Chicago Police Department did not violate the Constitution. (App. A at 30.)

If there were no purposeful discrimination by the City, then there cannot be a basis in the Fourteenth Amendment for the district court to prohibit the administration of the selection and promotion examinations themselves, let alone for contriving the extensive relief decreed in this case.

2. Even if purposeful discrimination had been shown, however, the remedies selected by the district court here and endorsed by the court of appeals are unauthorized by the Civil Rights Act. Indeed, they are obviously contrary to the provisions of Title VII itself. The key element in the district court's remedy was the mandatory racial and ethnic quota: a certain percentage of new promotions must be reserved for persons of a particular, specified race or national origin. Yet Title VII makes it an unlawful employment practice for an employer to prefer or punish an employee on account of his skin color or the accident of his ancestry. And § 703(j) amplifies this rule by forbidding the use of preferential hiring policies to change the "racial balance" of an employer's workforce. In *Griggs* v. *Duke Power*

Co., 401 U. S. 424, 430, 431 (1971), this Court pointedly observed that Title VII:

> does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Actions that would constitute a violation of the Civil Rights Act if done by an employer cannot be denatured and legitimated just because they were ordered by a federal court. Conduct forbidden to employers by Title VII because it constitutes racial discrimination is certainly not entrusted by this Title to district courts as a remedy for racial discrimination. On the contrary, the Civil Rights Act contemplated precisely the opposite result. This point was made clear by Hubert H. Humphrey, the Whip of the Senate majority at the time of the passage of the 1964 Civil Rights Act, and that statute's floor manager and chief draftsman as well. In defending proposed Title VII to his colleagues, Senator Humphrey stressed:

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the [Equal Employment Opportunity] Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times, but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as a basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race and religion. (110 Cong. Rec. 6549 (1964).)

Tacitly recognizing the illicit character of mandatory racial quotas under Title VII, a number of federal courts which have imposed this remedy have sought to disguise the true nature of their action by the use of such gingerly euphemisms as "numerical objectives," *Southern Illinois Builders Association* v. *Ogilvie*, 471 F. 2d 680, 686 (7th Cir. 1972), "preferential

relief," *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 273 (4th Cir. 1976), or, more simply, "goals," *Rios* v. *Enterprise Ass'n. Steamfitters Loc. 638 of U. A.*, 501 F. 2d 622, 629 (2d Cir. 1974). Emboldened by the use of such mandatory quotas in at least nine circuits* and perhaps by this Court's refusal thus far to review the imposition of such relief, the court of appeals here has abandoned the modesty of circumlocution and declared without pretense that mandatory quotas are an allowable remedy under Title VII (App. A at 32-33). In the light of the language and purpose of Title VII, and the unambiguous clarity of its legislative history,** this holding by the court of appeals is little less than judicial legislation, not complementing, but contradicting, the Act of the Congress.

3. The 1973 sergeants' examination of the Chicago police department is one of the most carefully designed and construct-validated standardized examinations ever used by an employer. It corresponds to the requirements for such tests set out by the Law Enforcement Assistance Administration of the Department of Justice. The examination does not include questions

* First Circuit: *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F. 2d 1017, 1026-28; *certiorari denied*, 421 U. S. 910 (1975);

Second Circuit: *Rios* v. *Enterprise Association Steamfitters Local 638 of U. A.*, 501 F. 2d 622, 628-31 (1974);

Third Circuit: *United States* v. *International Union of Elevator Contractors*, 538 F. 2d 1012, 1017-20 (1976);

Fourth Circuit: *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 273-74, *certiorari denied*, 45 U. S. L. W. 3330 (October 29, 1976);

Fifth Circuit: *Local 53, Heat Workers* v. *Vogler*, 407 F. 2d 1047, 1053-54 (1969);

Sixth Circuit: *United States* v. *International Brotherhood of Electrical Workers*, 428 F. 2d 144, 149-51, *certiorari denied*, 400 U. S. 943 (1970);

Seventh Circuit: *Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F. 2d 680, 686 (1973);

Eighth Circuit: *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 377 (1973);

Ninth Circuit: *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, *certiorari denied*, 404 U. S. 984 (1971).

** This legislative history is epitomized by Judge Hays in his dissenting opinion in *Rios, supra*, 501 F. 2d at 634-636.

meant to test "aptitude," "attitude," or any such elusive qualities supposed to make for success as a police sergeant. Instead, the examination confines itself exclusively to matters of law and established police policies and procedures which the City insists be mastered by anyone performing the duties of police sergeant.

The relevance of this information on law, policy, and procedure was not assumed or left either to "common sense" or to chance. The examination was not drafted until a comprehensive job analysis of a sergeant's duties was performed by the Chicago Civil Service Commission, which required four man-years to complete. It included, in addition to numerous on-the-job observations, interviews with 147 active sergeants, drawn from all geographic districts of the City and representing every field of police work. From these observations and interviews, the Commission identified 137 separate operations or jobs which police sergeants must perform; these operations were further organized into a dozen "critical task" categories. From this analysis, an examination was prepared by professional psychologists on the Commission's staff. Each question on the resulting examination was then double-checked, that is, analyzed by the Commission staff in order to verify that it did in fact address matters substantially related to one or more of the "critical tasks" that had previously been identified.

The examination set out in Appendix B hereto was the outcome of these efforts. Every question is directed to some matter which has been found by painstaking empirical research to be germane to the police sergeant's work. Who is responsible for notification of the hospital when an absconded mental patient is apprehended? (Question 5.) If an off-duty police officer is involved in a tavern brawl, might he be liable for civil damages under the federal civil rights laws? (Question 19.) When may an officer *not* search or seize an arrestee? (Question 55.) Must a supervisor's approval be secured before police dogs may be summoned to the scene of a crime? (Question 66.) Does an arrest for attempted suicide require the preparation of a case report? (Question 72.)

If the City is entitled to insist that its sergeants actually be familiar with such elementary details of their jobs, it surely entails no excessive leap of logic to conclude that candidates who *know* that patrolmen are authorized by department policy to summon police dogs to the scene of a crime on their own initiative, or who *know* that the watch commander is the person responsible for notifying a hospital that an escaped mental patient has been arrested, will be able to answer these questions correctly; and that, contrariwise, candidates who do not know the answers for purposes of the examination will not know them in practice on the job. The examination is thus "construct-valid," and fully corresponds to the most exacting professional standards for such validity.

The district court, however, found that the test had not been validated by a measurable criterion relationship. Criterion-related validation—the validation technique preferred by the guidelines of the Equal Employment Opportunity Commission, 29 C. F. R. § 1607.5(a)—may be accomplished by one of two possible strategies, the "predictive" or the "concurrent." The predictive strategy requires the promotion examination to be administered over a period of years on an essentially experimental basis. Promotions would be made disregarding candidates' examination scores. Eventually, after several years' experience, the performance of the sergeants on the examination would be correlated with some presumably-valid criterion of actual performance on the job in order to determine whether there existed a significant statistical correspondence between the two.

The "concurrent" strategy, the one followed by the City with respect to this examination, produces faster results than the predictive strategy. This technique calls for the administration of the examination to existing incumbents to determine whether scores on the examination bear some regular relationship to actual performance on the job, as ascertained by some presumably-valid criterion of performance. The evidence of concurrent validity of this examination showed not only that there was

a statistically significant relationship between the test scores and the performance criterion, but that when the examination was given to 176 sergeants, half of them black and half of them white, and matched for age and performance ratings, the examination did not produce a disparate racial impact. Sergeants of both races did equally well.

The district court refused to accept the construct-validity of the examination, however, and did not credit the City's evidence of a concurrent relationship between the scores on the test and some criterion of on-the-job performance. The court left it unclear, moreover, what evidence might be received to rebut the presumption of discrimination which arises when an examination produces an adverse impact on candidates from minorities protected by Title VII. It suggested, however, that prediction "of performance on the job . . . is the test we are to apply in testing the testers." 411 F. Supp. at 238.

The court of appeals approved of this holding on the apparent premise that it was based on the City's failure to meet the requirements of the E. E. O. C. guidelines on tests of this sort, 29 C. F. R. Part 1607. This is an enigmatic holding indeed, for the guidelines clearly do authorize the use of construct-valid tests, 29 C. F. R. § 1607.5(a); and indeed, this Court has said that an examination is acceptable under Title VII if the traits which it was designed to test are "significantly correlated with important elements of work behavior." *Griggs* v. *Duke Power Co.*, 401 U. S. at 433, n. 9 (1971). There seems to be little question that the sergeants' examination does, in fact, test for knowledge of police policy and procedure. The issue would then appear to be whether it is lawful for the City to insist on sergeants knowing this information, when the need for such knowledge has been empirically established beforehand, although this insistence produces a performance disparity along racial lines. Neither court below could cite any authority for the proposition that this insistence is unlawful; and indeed, no such authority exists. Race-linked examination performance disparities, in and of themselves, were not prohibited by Title VII. Only examina-

tions which cannot be shown to have a relationship to the job for which they are administered are banned. It is thus apparent that the dissatisfaction of the courts below with the sergeants' examination was the City's failure to bear the burden of persuading that knowledge of police department policies—and not just any policies, but those which have been systematically observed to be part of a sergeant's job—is a skill related to the business of being a police sergeant.

When the lower courts' holdings descend to this level of tendentiousness and cavil, it seems appropriate to ask whether there has not been introduced into Title VII a clause which Congress never enacted—that racial disparities in examination performance conclusively show the existence of employment practices prohibited by Title VII.

The elimination by the lower courts of examinations validated as in this case will have paradoxical results. If the City were to rely solely on a relationship between the examination scores and some asserted index (or "criterion") of actual performance, what would that criterion be? If police sergeants' performance were easily quantifiable, a non-controversial criterion might be easy to find—batting average, number of tons processed, number of sales made. But given the variability and complexity of a sergeant's job, the only criterion which is available for use is the composite judgments of other policemen, that is, efficiency ratings. However, both the E. E. O. C. guidelines, 29 C. F. R. § 1607.5(4), and the trial court below, 385 F. Supp. at 560, recognized that such performance ratings are themselves "highly subjective" and unusually vulnerable to contamination for racial bias. It is in order to avoid, and to ameliorate, this possibility of contamination by bias that a construct-valid examination was chosen in the first place. The criterion-validation evidently required by the courts below, then, is as subject, or more subject, to challenge for racial bias as the validation procedure primarily relied upon by the City here.

The practical effect of the court of appeals' judgment is essentially to rule that examinations of this sort—paper-and-pencil examinations, as they were characterized by the trial court—may never be used if they produce a disparate racial impact. This, in spite of evidence showing the manifest relationship of the examination to the sergeant's job, in spite of evidence that the questions on the examination were conceived from racially-neutral data, and in spite of the incontrovertible fact that no other method of merit selection for promotion—including selection by means of a criterion-valid examination—would be so free of racial bias. In such circumstances, it is fair to conclude that racially-disparate performance on the examination is what the courts below find objectionable; and there is no warrant, in Title VII or in any other provision of law, for any such rule.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 76-1113, 76-1152, 76-1205, & 76-1344

UNITED STATES OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 2080—**Prentice H. Marshall**, *Judge.*

ARGUED JUNE 14, 1976—DECIDED JANUARY 11, 1977

Before FAIRCHILD, *Chief Judge*, SWYGERT and PELL, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This case is a consolidated civil rights action broadly challenging the employment practices of the Chicago Police Department. The district court in its January 5, 1976 memorandum decision found that the method utilized by the Police Department in hiring and promoting police officers resulted in discrimination against blacks, Hispanics, and women in violation of federal civil rights statutes and the Constitution. On February 2, 1976 the court entered a final order which enjoined those employment practices found to be discriminatory, imposed numerical hiring and promotion quotas, and continued its injunction against

payment of federal revenue sharing funds to the City of Chicago pending compliance with the court's order. The defendants challenge both the court's findings of discrimination and its choice of remedies.

I

We will briefly review the proceedings in the district court, which have been thoroughly detailed in previously reported decisions.[1]

On September 9, 1970 Renault Robinson, a black Chicago police officer, and the Afro-American Patrolmen's League[2] filed a complaint against the Superintendent of Police, the City of Chicago, and the members of the Police Review Board charging racial discrimination in the assignment, promotion, and discipline of Chicago police officers.[3] The Robinson plaintiffs sought declaratory and injunctive relief and damages under the first, fifth, thirteenth, and fourteenth amendments to the Constitution, and under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981 and 1983.

A second action was brought on May 13, 1973 against the City, the Superintendent of Police, and the Chicago Civil Service Commission and its Secretary by Tadeo Robert Camacho and ten blacks and Hispanics who were unsuccessful applicants for positions as Chicago police officers. The Camacho plaintiffs challenged the full range of departmental practices with respect to recruiting, screening, and hiring. They sought relief under 42 U.S.C. §§ 1981 and 1985, the fourteenth amendment,

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[1] *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976); 395 F. Supp. 329 (N.D. Ill. 1975); 385 F. Supp. 543 (N.D. Ill. 1974).

[2] The League is an association formed by members of the Chicago Police Department to represent the interests of black police officers and the black community.

[3] The original complaint, which also challenged the Department's hiring practices, was dismissed by the district court. The action proceeded on an amended complaint without allegations with respect to hiring.

and Titles VI and VII of the Civil Rights Act of 1964 (which had been amended and made applicable to municipalities in 1972), 42 U.S.C. § 2000(d) and (e).

A third suit was filed August 14, 1973 by the United States against the City, the Superintendent of Police, and the Chicago Civil Service Commission alleging a pattern and practice of discrimination within the Chicago Police Department against blacks, Hispanics, and women in the hiring, assignment, promotion, and discipline of police personnel. The Government sought relief under Title VII, under sections 1981 and 1985, and under the anti-discrimination guidelines and regulations of the Department of Justice and the Law Enforcement Assistance Administration, 28 C.F.R. §§ 42.201 *et seq.* and 42.301 *et seq.* Upon plaintiffs' joint motion, the three cases were consolidated in the district court before Judge Prentice H. Marshall.

An evidentiary hearing on plaintiff's motion for a preliminary injunction commenced on May 30, 1974. Plaintiffs sought to restrain further hiring by the City from the patrolman's eligibility roster and furtner promotion to the rank of sergeant from the sergeant's eligibility roster. The patrolman's eligibility roster was based on the results of the 1971 patrolman's examination given by the Chicago Civil Service Commission and a series of physical and medical tests. The sergeant's eligibility roster was based on the results of the 1973 sergeant's examination given by the Commission, departmental efficiency ratings, and seniority. Plaintiffs claimed both examinations, as well as other criteria used by the Police Department in hiring and promotion, improperly discriminated against black and Hispanic candidates. In addition, the Government sought preliminary relief against the disparate treatment of women within the Department. Just prior to the hearing, Louis Arado and other police officers who held positions on the 1973 sergeant's eligibility roster were permitted to intervene as defendants.

The preliminary injunction hearing consumed seventeen trial days. During the hearing, a consent decree was entered which resolved challenges to the Police

Department's physical and medical requirements. On November 7, 1974 the district court issued findings of discrimination in hiring and promotion and preliminarily enjoined the defendants from utilizing practices that discriminated against minorities and women. The court also specifically prohibited any further hiring or promotion from eligibility rosters based on the 1971 patrolman's and the 1973 sergeant's examinations. Relying on representations by the City that a new patrolman's examination was being developed, the court declined to impose any preliminary hiring or promotion quotas.

A fourth action alleging employment discrimination in the Chicago Police Department was filed on February 7, 1974 in the district court for the District of Columbia against the Secretary of the Treasury and the Office of Revenue Sharing.[4] In this action plaintiffs Robinson, the Afro-American Patrolmen's League, and the National Association for the Advancement of Colored People sought to enjoin further payment of revenue sharing funds earmarked for the City of Chicago under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221 *et seq.* They alleged that a substantial portion of funds paid to the City of Chicago under the Act were being allocated to the Police Department, that the Police Department was engaged in discriminatory employment practices, and that payment of further funds to the City was consequently prohibited by the nondiscrimination provision of the Act, 31 U.S.C. § 1242. This suit was brought because the plaintiffs were dissatisfied with the response of the Secretary and the Office of Revenue Sharing to an administrative complaint filed in September 1973.

On May 29, 1974 the Secretary responded to the administrative complaint and recommended to the Attorney General, pursuant to 31 U.S.C. § 1242(b), that he bring a civil suit against the City. The Government

[4] The details of these proceedings are set out in the district court's decision in 395 F. Supp. 329 and in our own decision in a prior interlocutory appeal in this case, 534 F.2d 708 (7th Cir. 1976).

accepted this recommendation on May 30, 1974 by amending its complaint in the Northern District of Illinois to allege violations of the Fiscal Assistance Act.

The District of Columbia district court then initially denied the requested injunctive relief on June 28, 1974, reasoning that the Secretary had already fulfilled his statutory duty. Following entry of the preliminary injunction against the Chicago defendants in the proceedings in the Northern District of Illinois, however, the District of Columbia court reconsidered plaintiffs' motion for injunctive relief. In reliance on Judge Marshall's findings, the court on December 18, 1974 enjoined further payment of revenue sharing funds to the City until such time as the Secretary and the Office of Revenue Sharing determined that the Police Department was in compliance with the nondiscrimination provision of the Fiscal Assistance Act. Subsequently the City intervened in the District of Columbia proceedings and unsuccessfully sought modification of that court's order. The action was then transferred at the City's request from the District of Columbia to the Northern District of Illinois, where it was consolidated with the other cases pending against the City. In the following months, the district court twice denied motions by the City to modify the order forbidding payment of revenue sharing funds.

While the parties litigated the revenue sharing question, the original actions moved forward. After extensive negotiations, all interested parties consented to an interim hiring agreement that permitted the City to hire six hundred police officers from the 1971 patrolman's and the 1972 police woman's/matron's lists in three groups of two hundred, with one hundred positions in each group to be filled by minority male candidates, thirty-three by women, and the remaining sixty-seven by white males. The court approved the agreement on December 16, 1974. The City then notified the first group of two hundred to report to the police training academy on January 6, 1975. However, on January 2 the City unilaterally suspended the interim hiring agreement and instructed the previously notified applicants not to report for training. On March 10, the opening day

of the trial on the merits, the City announced, again unilaterally, a new examination for patrol officers and a program for the appointment of temporary sergeants not be selected from the 1973 sergeant's list. Plaintiffs moved to enjoin the promotion of temporary sergeants, but this motion was denied on June 6. The court, however, did grant in part the motion of the Camacho plaintiffs to compel compliance with the interim hiring agreement. On April 21 it ordered the City to proceed with the suspended hiring of the two hundred applicants previously notified. It declined, however, to enforce the remainder of the agreement because of the City's assurance that results of the new patrolman's examination soon would be forthcoming.

The trial on the merits in the four consolidated cases began on March 10, 1975. Prior to trial the court allowed the intervention as plaintiffs of Carolyn Burauer and other named individuals who aspired to become police officers and who charged that they had been the victims of discrimination because they were women. It also permitted Roy Isakson and others who held positions on the 1971 patrolman's eligibility roster to intervene as defendants. All parties agreed that evidence adduced at the evidentiary hearing on the motion for a preliminary injunction would be considered as part of the trial on the merits pursuant to Fed.R.Civ.P. 65(a)(2).

On January 5, 1976 the district court entered a memorandum decision reaffirming in most respects the preliminary findings of discrimination in hiring and promotion made in its November 1974 decision. It found no discrimination, however, in the Police Department's procedures governing promotion to the rank of lieutenant and found no racial discrimination in the Department's assignment of personnel. It deferred final decision on the allegations of discrimination in discipline and on the personal claims of the Robinson plaintiffs.

In its implementing order of February 2, the district court made permanent the principal aspects of the preliminary injunction. To fill immediate vacancies in patrol officer ranks, it ordered the hiring of four

hundred patrol officers pursuant to the uncompleted portion of the interim hiring agreement and authorized further hiring from the 1971 patrolman's list and the 1972 policewoman's/matron's list in accordance with the racial and sexual percentages specified in that agreement. The court also permitted the appointments of temporary sergeants to be made permanent.

In addition, the court imposed racial and sexual quotas on future hiring and promotion as a long term goal to remedy the past effects of discrimination. It required that at least sixteen percent of new patrol officer vacancies be filled by women and that at least forty-two percent of those vacancies be filled by black and Spanish-surnamed men. The City was permitted, though not required, to utilize persons remaining on the 1971 and 1972 rosters in filling vacancies after these quotas were satisfied.

The court further ordered that forty percent of the officers promoted to sergeant be black or Spanish-surnamed. The City was allowed at its option to use the 1973 roster in determining who would be promoted after this guideline was met.

Finally, the court continued the withholding of federal revenue sharing funds until the City brought itself into compliance with the nondiscrimination provision of the State and Local Fiscal Assistance Act. It ordered the parties to submit proposed timetables for the release of those funds subject to action by the City to cease its discriminatory conduct and comply with the court's order.

II

As a preliminary matter, the defendants contend that the Robinson complaint must be dismissed for lack of subject matter jurisdiction.[5] The Robinson complaint alleged general federal question jurisdiction under 28

[5] There is no jurisdictional issue with respect to the other plaintiffs, since they all alleged violations of Title VII. The Robinson plaintiffs could not bring their action within the ambit of Title VII since that statute was not applicable to municipalities when they filed their complaint in 1970.

U.S.C. § 1331 for violations of the first, fifth, and fourteenth amendments and civil rights jurisdiction under 28 U.S.C. § 1343(3) for violations of the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981 and 1983. The district court concluded that no action lay for violation of section 1983[6] against the City or the Police Review Board since municipal corporations are not "persons" subject to suit under that provision. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961). The court held, however, that jurisdiction was proper both under section 1331 and under section 1981 through its jurisdictional counterpart, section 1343(3). *Robinson v. Conlisk*, 385 F. Supp. 529 (N.D. Ill. 1974). We agree with these conclusions.

The availability of general federal question jurisdiction under section 1331[7] as an alternative to civil rights jurisdiction under section 1343 for a plaintiff alleging constitutional deprivations against a municipal corporation has been recognized by the Supreme Court and by this court. *City of Kenosha v. Bruno*, 412 U.S. at 514; *Calvin v. Conlisk*, 520 F.2d 1, 8 (7th Cir. 1975), *vacated on other grounds*, 424 U.S. 902 (1976). Section 1331, however, unlike section 1343, requires the plaintiff to meet a $10,000 amount in controversy requirement. The general principle governing dismissal for want of jurisdictional amount is that, unless the law gives a

[6] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[7] 28 U.S.C. § 1331 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

different rule, the sum claimed in good faith by the plaintiff at the time of filing controls. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1937); *Calvin v. Conlisk*, 520 F.2d at 9. The district court concluded that Robinson satisfied this test by alleging in good faith that he had lost $30,000 in pay because of the defendants' discriminatory acts. The court also found that the requirement was met by the good faith allegations of the Afro-American Patrolmen's League that it had suffered damages of $100,000 because defendants' discriminatory acts discouraged membership in and support for the League.

The City contends, however, that because the plaintiffs asked for damages only from the Superintendent of Police and merely requested injunctive and declaratory relief against the City and the Police Review Board, section 1331 jurisdiction is improper with respect to the City and the Board. We reject this argument. In a suit seeking injunctive relief, the amount in controversy is the value of the right to be protected or the extent of the injury to be prevented. *1* Moore's Federal Practice ¶ 0.96 [3.-1] at 939. The Robinson plaintiffs have alleged that discriminatory practices by the City will, unless enjoined, cause them future damages well in excess of $10,000. This is enough to satisfy the statute.

The district court alternatively found that subject matter jurisdiction with respect to the claims made against the City and the Board could be grounded on section 1981[8] through section 1343(3), its jurisdictional counterpart, which has no amount in controversy requirement. We agree. As the court noted, the language, purpose, and legislative history of section 1981 differ substantially from those of section 1983. Unlike section

[8] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

1983, which requires action under color of state law, section 1981, intended to enforce the thirteenth amendment, prohibits *all* racial discrimination which deprives any person of the "full and equal benefit of all laws." *Runyon v. McCrary*, 44 U.S.L.W. 5034, 5037 (U.S. June 25, 1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 37-44 (1968). The exception from liability for municipalities that can be discerned from the legislative history of section 1983 is absent in the language or history of section 1981.[9] Moreover, it would be anomalous to hold that section 1981 proscribes racial discrimination by purely private actors but not by municipalities. *See Maybanks v. Ingraham*, 378 F. Supp. 913, 917 (E.D. Pa. 1974).

III

We turn now to the merits of this case. The district court held that the employment practices of the Police Department discriminated against racial minorities and women in violation of Title VII of the Civil Rights Act of 1964 and the equal protection clause. We shall evaluate the court's conclusions with respect to each of these sources of law proscribing discrimination.

In reviewing the court's decision, we are bound under Fed.R.Civ.P. 52(a) to accept findings of fact unless they are clearly erroneous. *Stewart v. General Motors Corp.*, 542 F. 2d 445, 449 (7th Cir. 1976); *Prince v. Packer Mfg.*

[9] The City has cited cases in which an action brought against a municipal corporation under both sections 1981 and 1983 was dismissed for want of jurisdiction without separate consideration of the section 1981 claim. *See Flood v. Margis*, 461 F.2d 253, 256 (7th Cir. 1972); *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973); *Percy v. Brennan*, 384 F. Supp. 800 (S.D. N.Y. 1974). These cases merely held that a municipality is not a "person" within the meaning of the Civil Rights Act, citing *Monroe, City of Kenosha*, or *Moor v. County of Alameda*, 411 U.S. 693 (1973). Because those cases construe section 1983, not section 1981, and because section 1981 in fact does not even speak in terms of a "person" as a defendant, we do not believe we are bound by previous decisions in which courts gave no consideration to the quite different language and history of section 1981.

Co., 419 F.2d 34, 36 (7th Cir. 1969). The statement that discrimination exists for the purposes of establishing liability under Title VII or under the Constitution, however, is as much a conclusion of law as a finding of fact. A distinction must be drawn between subsidiary facts to which the "clearly erroneous" standard applies, and the ultimate fact of discrimination necessary to trigger a statutory or constitutional violation, which is the decisive issue to be determined in this litigation. *See Stewart v. General Motors Corp.*, 542 F.2d at 449 (Title VII); *East v. Romine, Inc.*, 518 F.2d 332, 338-39 (5th Cir. 1975) (Title VII). Accordingly, we will make an independent examination of whether the Police Department's employment practices, as a matter of law, were proscribed under Title VII or the equal protection clause.

A. The Mechanics of Hiring and Promotion Within the Chicago Police Department

Hiring and promotion within the Chicago Police Department is governed by state law. The Illinois Municipal Code, Ill. Rev. Stat. ch. 24, § 10-1-7, provides that applicants for positions in a municipal police force must take competitive examinations. The statute states that "[s]uch examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate of manual skill." A roster of eligible candidates is then to be prepared from the results of the examinations, with rank on the roster to be determined by each candidate's scores. The roster is to include "the persons whose general average standing upon examination . . . is not less than the minimum fixed by the rules of . . . [the] commission, and who are otherwise eligible." Ill. Rev. Stat. ch. 24, § 10-1-12. When a vacancy occurs, it must be filled by the candidate standing highest on the roster. Ill. Rev. Stat. ch. 24, § 10-1-14. A person's name may be struck from the eligibility roster after two years. *Id.* If more than one examination is given within two years,

however, or if the administering commission gives another examination after two years without striking from the roster the names of those remaining from the old examination, rank on the roster is to be determined by relative excellence without reference to the time of examination. Ill. Rev. Stat. ch. 24, § 10-1-12.

Pursuant to these statutory commands, the Chicago Civil Service Commission periodically administered a patrolman's eligibility examination to individuals who met certain age, height, weight, and residency requirements. The examination from which appointments were being made at the time the Government filed suit was administered on December 4, 1971. It was a two-hour written examination containing 120 multiple choice questions designed to test vocabulary, grammar, word choice, arithmetic, and verbal and mathematical reasoning. Those who received a passing score on the written examination were required to submit to a physical and medical examination. The names of applicants who passed the physical and medical screening were then posted on a patrolman's eligibility list in rank order according to their scores on the written test.

Whenever the Police Department needed patrolmen, the Commission supplied a list of names from the top of the eligibility list. The Department then conducted a background investigation of the individuals whose names had been supplied. An applicant was disqualified and removed from the eligibility list if the investigation proved that he had made false statements to the Commission or violated its rules in connection with his application or his examination, that he had ever been discharged from public employment for cause, or that evidence established his "bad character, dissolute habits, or immoral conduct."

The Municipal Code similarly provides that promotional rosters must be based on competitive examinations, as well as "ascertained merit" and seniority. Vacancies must be filled by one of the three candidates at the top of the roster, and a high-ranking candidate cannot be passed over more than twice. Candidates can be struck from the promotional roster after two years if

there are no existing vacancies. Ill. Rev. Stat. ch. 24, § 10-1-13.

The Chicago Civil Service Commission accordingly required patrolmen who sought promotion to the rank of sergeant to take a written examination. The examination at issue in this case was administered on August 18, 1973, and contained one hundred multiple choice questions designed to test a candidate's knowledge of departmental regulations and procedures, and his judgment in situations that might confront a police sergeant. An eligibility roster was then derived from a weighted combination of scores on the written examination (sixty percent), recent patrolman efficiency ratings (thirty percent), and points for seniority (ten percent). Those who achieved a composite score of seventy were placed on the roster in rank order according to their composite scores. Promotions were to be made from the top of this list as positions became available.

The Illinois Municipal Code makes no distinction between the sexes in providing procedures for hiring and promotion to municipal police forces. Nonetheless, the Police Department has always maintained sexually segregated procedures for hiring and promotion. For the purposes of this case, the hiring of women was based on the 1972 policewoman's/matron's list, derived from a separate examination. Based on the record, there appears to have been no organized procedure governing the promotion of women within the Department.

B. Title VII

1. General Principles

The basic legal standard to be utilized in litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, was developed by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and amplified in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In *Griggs*, the Court held that a test for employment or promotion having a disproportionately adverse effect on black applicants was unlawful under Title VII unless it was demonstrably related to job performance. The Court stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 431.

Therefore, a prima facie case of discrimination is established where evidence shows "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle*, 422 U.S. at 425; *Stewart v. General Motors Corp.*, 542 F.2d at 449. Upon such a showing of disparate effect on minority applicants, the burden shifts to the employer to show "that any given requirement [has] a manifest relationship to the employment in question," and that the "disparity is the product of nondiscriminatory factors." *Griggs*, 401 U.S. at 432; *Stewart*, 542 F.2d at 450. Where employment tests are at issue, courts have often required an employer to prove job-relatedness by evidence that the tests have been "validated" in accordance with the Guidelines issued by the Equal Employment Opportunity Commission and the professional standards of the American Psychological Association that the Guidelines adopt.[10] *See, e.g., Douglas v. Hampton*, 512 F.2d 976, 986 (D.C. Cir. 1975); *United States v. Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973). The Supreme Court has held that in considering evidence of job-relatedness the EEOC Guidelines are entitled to great deference as the administrative interpretation of Title VII by the agency designated to enforce it. *See Albemarle*, 422 U.S. at 430-31; *Griggs*, 401 U.S. at 433-34.

Moreover, since Title VII explicitly prohibits sexual as well as racial discrimination, *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970), the standards laid down in *Griggs* should be applied when sex, as well as race, is at issue. *See Bowe v. Colgate, Palmolive Co.*, 489 F.2d 896, 900 (7th Cir. 1973).

[10] Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607; American Psychological Association, Standards for Educational and Psychological Tests and Manuals (1966).

2. Racial Discrimination

The district court, in applying these standards, permanently enjoined further hiring and promotion from the 1971 patrolman's and the 1973 sergeant's eligibility rosters. This decision was based on the court's findings that the 1971 patrolman's examination, the Department's background investigation, and the 1973 sergeant's examination each had an adverse impact on minority candidates and that these selection devices had not been shown to be job-related. Based on an independent review of the record, we hold that the district court's conclusions were correct.

a. Disproportionate Impact

Hiring. The district court found that thirty-four percent of the total pool of applicants taking the 1971 patrolman's examination were black or Hispanic, but that only ten percent of the candidates actually hired from the 1971 roster at the time its use was suspended were members of those minority groups. In analyzing the evidence, the court also examined the separate components making up the hiring process within the Chicago Police Department, and determined that each of them had a discriminatory impact. We find the court's factual findings to be supported by substantial evidence and hold that the disparity produced by the combination of these components is enough to establish a prima facie case that the Department's employment practices were discriminatory in violation of Title VII.

The district court first looked at comparative success on the 1971 patrolman's examination and found that blacks and Hispanics failed at twice the rate of white applicants.[11] Defendants contend that this evidence is insufficient to show discrimination because plaintiffs failed to show that the disproportionate failure rate resulted from racial factors. This argument mis-

[11] Black and Hispanic applicants failed the examination at rates of 67 percent and 68 percent while only 33 percent of the white applicants failed. In addition, those minority applicants who passed the examination tended to score lower than whites, further reducing their chances for employment.

conceives the legal standard to be utilized in determining whether a prima facie case of discrimination exists within the meaning of Title VII. Plaintiffs did not need to show that the examination was devised with the intent to exclude racial minorities or that a direct causal relationship exists between an applicant's race and his performance. Rather, plaintiffs needed only to show that the examination had an adverse impact on minority applicants as a group; at that point, the burden would be on the City to demonstrate that the examination in fact tested job-related qualifications. *See Griggs*, 401 U.S. at 431-32; *Albemarle*, 422 U.S. at 425; *Stewart*, 542 F.2d at 450. *See also Washington v. Davis*, 44 U.S.L.W. 4789, 4794 (U.S. June 8, 1976).

Second, the district court found that the Department's background investigation disqualified a significantly greater percentage of minority applicants than white applicants. For example, blacks were disqualified at twice the rate of white applicants because of a previous arrest record and at three times the rate of white applicants because of a negative employment record. Since 1968, 25.7 percent of the black applicants who underwent background investigations were disqualified as compared to 15.2 percent of the white applicants. Defendants assert that it was unsound for the district court to focus on the comparative failure rates of black and white applicants. Instead, they urge, the court should have compared the respective pass rates of the two groups. While black people were disqualified at approximately five-thirds the rate of white people, the white group only passed the background screening at about eight-sevenths the rate of the black group. The latter figure is less impressive than the former one for the purposes of establishing discriminatory impact.

This argument might be convincing if the district court had relied solely on the disparity in the results of the background screening in finding that the Department's employment practices were discriminatory. The court utilized the disparity in screening results, however, only in conjunction with other evidence in reaching its conclusion. It was certainly entitled to do this, whether it viewed the statistics in terms

of passing or failing. *See Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1294-95 (8th Cir. 1975). Moreover, the court's ultimate finding was based on the percentage of white applicants actually hired in contrast to the percentage of minority applicants hired. This emphasis on selection rather than disqualification conforms with the defendants' wishes.

Promotion. The district court's finding that the use of the 1973 sergeant's roster had an adverse impact on minority groups is also supported by substantial evidence. Of the 6,555 patrolmen who took the 1973 sergeant's examination, 1,298 were black or Hispanic. While 1,918 patrolmen achieved a passing composite score of seventy by combining their examination score and points for efficiency ratings and seniority, the parties agreed, based on previous experience, that only four hundred of those who passed had any chance for promotion. Only twenty-nine of these first four hundred men were black or Hispanic. Thus, 2.23 percent of the minority candidates taking the examination had a practical chance of being promoted, compared to 7.07 percent of the white candidates.[12] We agree with the district court that a prima facie case of discrimination can be based on this disparity.

Defendants mount two principal attacks on the validity of these statistics. First, they assert that the difference between the average performance of black and white candidates on the written examination is too slight to support an inference of discrimination. This argument misses the point, for it is the impact of the examination on the racial composition of the first four hundred finishers, not the average impact, that is significant. The ultimate question is whether substantially fewer minority patrolmen than white patrolmen were promoted to the rank of sergeant, and average scores are irrelevant in answering that question.

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[12] The disproportionate impact on minority applicants is attributable to the written examination since the district court found that neither the efficiency ratings nor the seniority factor had an appreciably differential impact on minorities.

Second, defendants attack the district court's reliance on combined statistics for blacks and Hispanics, contending that separate statistics indicate that Hispanic candidates for promotion in fact were as successful as whites on the examination both in terms of pass rate and practical success rate. Even assuming that this contention is correct, however, plaintiffs have still made out a prima facie case that the examination produced a discriminatory impact. If black and Hispanic candidates are considered separately, the adverse impact which the testing procedure had on blacks is even more striking: only 1.77 percent of the black candidates, compared to 7.07 percent of the white candidates, made the top four hundred places on the roster. Defendants' argument only goes to the appropriateness of including Hispanics in the remedy to be imposed to correct discrimination in promotional practices.

b. JOB-RELATEDNESS

The defendants attempted to justify the use of the selection and promotion practices that excluded minority candidates at disproportionate rates by introducing statistical studies and expert opinion evidence purporting to establish the job-relatedness of the challenged devices. The district court found that the validity studies offered by defendants failed to comply with the requirements of the EEOC Guidelines and APA Standards for test validation and that defendants' experts failed to establish that any of the selection and promotion devices were demonstrably job-related.

On appeal the defendants seek to challenge the district court's conclusions by relitigating the probativeness of the evidence introduced and rejected at trial. The findings of the trial court with respect to this evidence—statistical studies and the testimony of expert witnesses—are perfect examples of subsidiary facts to which the clearly erroneous standard applies. As this court has observed, "[t]he resolution of evidentiary conflicts is the precise function for which our trial courts sit [and it] is only necessary for us to determine on review whether the findings supporting the judgment have an evidentiary base." *Harry Alter Co. v. Chrysler Corp.*,

285 F.2d 903, 906 (7th Cir. 1961); *Prince v. Packer Mfg. Co.*, 419 F.2d 34, 36 (7th Cir. 1969). We should reverse the district court's findings only if, with due deference to the trial judge's resolution of conflicting evidence and to his determination of credibility, we are left with the definite and firm conviction that a mistake has been committed. *Guzman v. Pichirilo*, 369 U.S. 698, 702 (1962). We conclude that no mistake has been made and affirm the findings of the district court.

The 1971 Patrolman's Examination. Defendants sought to show that the 1971 patrolman's examination was job-related through the testimony of an outside expert commissioned by the City to conduct a validity study of the 1971 examination.[13] This was a "criterion validity" study designed to determine whether scores on patrolman's entry examinations correlated with subsequent performance on the job measured by criteria selected to indicate job success.[14] Comparisons were made between success on the examinations and four criteria: (1) patrolman efficiency ratings, (2)

[13] The expert principally relied on results of the 1970 patrolman's examination, which was accepted by the court and the parties as the substantial equivalent of the 1971 test. We note that the 1970 examination had the same disproportionate effect on minorities as the 1971 examination, disqualifying blacks at the rate of 77 percent, Hispanics at 70 percent, and whites at 42 percent.

[14] The Supreme Court has recently described the professionally recognized methods for validating employment tests:

> Professional standards developed by the [APA Standards, *supra* note 10] accept three basic methods of validation: 'empirical' or *'criterion'* validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified), *'construct'* validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance), and *'content'* validity (demonstrated by tests whose content closely approximated tasks to be performed by the applicant). (Emphasis added). *Washington v. Davis*, 44 U.S.L.W. 4789, 4794 n. 13 (U.S. June 8, 1976).

departmental awards, (3) disciplinary actions, and (4) performance on sergeant's promotion examinations and actual promotion to command ranks. Although the defendants' expert testified that this study established the validity of the patrolman's examination, we are persuaded that the district court properly rejected this evidence under the governing EEOC Guidelines. Compliance with these Guidelines is generally required absent some showing that a cogent reason exists for noncompliance. *United States v. Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973).

The correlations between the examinations and each criterion failed to meet minimum professional requirements. The study showed no correlation between test performance and disciplinary actions. There was some correlation with efficiency ratings, but it did not reach the level of statistical significance required by the EEOC Guidelines to ensure it was attributable to some factor other than chance. *See* 29 C.F.R. § 1607.5(c)(1).

The study did discover a small but statistically significant correlation between test performance by white applicants and departmental awards, but found no correlation for that criterion with respect to black applicants. The EEOC Guidelines require, where technically feasible, that an examination be separately validated for both minority and nonminority candidates. 29 C.F.R. § 1607.5(b)(5). The Supreme Court in *Albemarle* cited this Guideline with approval. 422 U.S. at 435. *See also Rogers v. International Paper Co.*, 510 F.2d 1340, 1350 (8th Cir.), *vacated on other grounds*, 423 U.S. 809 (1975); *Georgia Power Co.*, 474 F.2d at 913-14. Since an adequate minority sample made differential validation in this study technically feasible, the Guidelines were not satisfied.

The only valid correlation revealed by the study was between success on the patrolman's examination and subsequent success on the sergeant's examination, leading to promotion to command ranks. Under the EEOC Guidelines, however, promotability is a proper criterion for validation only where the "great majority" of employees can expect promotion within a "reasonable

period of time." 29 C.F.R. § 1607.4(c)(1). This approach was endorsed by the Supreme Court in *Albemarle*. 422 U.S. at 434. The district court found that only four hundred out of twelve thousand patrolmen could expect promotion within a reasonable time,[15] negating the importance of any correlation between performance on the two examinations. Moreover, the EEOC Guidelines discount promotability as a valid criterion when the potential of employees to perform high level jobs will change over time. 29 C.F.R. § 1607.4(c)(1). This would certainly be the case with a patrolman's ability to perform command duties, because some patrolmen will gain more from experience than others.

The study suffers from a further inadequacy in that it failed to comply with 29 C.F.R. § 1607.5(b)(3), which requires that the criteria used to predict job performance "must represent major or critical work behaviors as revealed by careful job analyses." *See Albemarle*, 422 U.S. at 432 n. 30. As the APA Standards note:

> [T]he logic of criterion-related validity assumes that the criterion possess validity. All too often, tests are validated against any available criterion with no corresponding investigation of the criterion itself. The merit of a criterion-related validity study depends on the appropriateness and quality of the criterion chosen . . . . Criterion-related validity studies based on the 'criterion at hand' chosen more for availability than for a place in a carefully reasoned hypothesis, are to be deplored. APA Standards at 27.

No job analysis of the position of patrolman was conducted before the 1971 examination or the 1974 validity study, indicating that the criteria used in the study were

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[15] This statistic is supported by the accepted evidence that only fifty to one hundred patrolmen are promoted to the rank of sergeant each year. Defendants challenge the statistics relied on by the district court and cite statistics indicating that the ratio of promoted persons to patrolmen is one to 3.5. Even these statistics, however, do not establish that the "great majority" of patrolmen can expect promotion and that promotion will occur within a reasonable time.

in fact chosen for their availability rather than because they would accurately predict job performance. The Civil Service Commission's Secretary, Dr. Pounian, testified that a job description of several paragraphs was maintained and updated from time to time, but this was not introduced into evidence. Furthermore, both the efficiency ratings and the 1973 sergeant's examination which the study used as criteria of job performance were found by the district court not to be job-related.[16]

Defendants, relying on the Supreme Court's recent decision in *Washington v. Davis*, 44 U.S.L.W. 4789 (U.S. June 8, 1976), assert that the district court erred in rejecting evidence that performance on the patrolman's examination correlated with success in the police training academy as proof of job-relatedness.[17] The Supreme Court in *Washington* held that under the nondiscrimination statutes applicable in that case,[18] a police department may use an entry test that predicts success in a required training program even if that test is not shown to predict job performance. Although the applicability of the Court's holding to cases arising under Title VII is not clear,[19] even if a relationship between examination performance and police academy performance would be enough to establish job-relatedness for Title VII purposes, we do not read the district court's opinion as expressing a finding that such a relationship exists.

[16] Although the court eventually concluded that the efficiency ratings were not discriminatory, that conclusion was based on the absence of a clear disparate impact rather than on convincing evidence of their reliability as measures of job performance.

[17] In its decision granting the preliminary injunction, the district court stated:

> Finally, Defendants sought to show a correlation between the results of the 1971 patrolman's exam (and earlier exams) and performance in the police academy. Again one would expect a correlation between performance on written exams. But significantly, defendants established no corresponding correlation between academy performance and patrol job performance. 385 F. Supp. at 556.

[18] D.C. Code § 1-320; *see also* the Federal Civil Service Act, 5 U.S.C. § 3304a.

[19] *See* 44 U.S.L.W. at 4800-01 (Stevens, J., concurring).

Moreover, we cannot find convincing proof of this relationship in the record before us. The only evidence that would support such a finding is testimony by Dr. Pounian at the preliminary injunction hearing that studies in the 1960's showed some correlation between earlier patrolman examinations and training academy success. No studies, however, were ever introduced into evidence.[20] Mere testimony that a test has been validated, without a record of validation, is insufficient to prove job relatedness. *Albemarle*, 422 U.S. at 428 n. 23; 29 C.F.R. § 1607.4(a). We therefore conclude that the evidence was insufficient to establish a relationship between success on the 1971 patrolman's examination and performance in the police training academy.

The Background Investigation. The district court found that the Department's background investigation, which disqualified applicants for employment without written regulations, standards, or guidelines, was not demonstrably related to job performance. Defendants assert that a background investigation to determine the fitness of individuals to serve in responsible positions of authority as municipal police officers is job-related on its face. We recognize that careful screening through investigation of an applicant's background can be a useful device in determining whether an applicant has the personal qualities required of a police officer. But we are persuaded that the district court properly concluded that the particular background investigation devised and administered by the Chicago Police Department did not achieve that purpose.

[20] In their supplemental briefs, defendants rely on a section of the 1972 Law Enforcement Assistance Administration Report on discrimination in the Chicago Police Department that cites a 1968 study by the Department showing a correlation between entry examination success and scores on tests given in the training academy. The LEAA Report, however, was offered into evidence by plaintiffs over defendants' objection and was admitted on a limited basis upon a stipulation by the parties. The section on which defendants now seek to rely was not part of the stipulation and consequently was not before the district court nor before us on appeal.

The Department's background investigation procedures required disqualification of applicants who evidenced "bad character, dissolute habits or immoral conduct." At trial, however, the administrative chief of the Department's investigation section was unable to define these criteria. The evidence showed that as part of the background investigation the Department inquires into an applicant's social status, financial condition, arrest and driving records, military, employment and educational background, and the arrest record of his family. Yet no evidence indicated what specific negative information in these areas would trigger disqualification. Moreover, as the district court correctly noted, courts have found disqualification or discharge in private sector employment to be impermissible when based on several of these factors. *See, e.g., Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972) (arrest); *Wallace v. Debron Corp.*, 494 F.2d 674 (8th Cir. 1974) (financial condition); *Johnson v. Pike Corp.*, 332 F. Supp. 490 (C.D. Cal. 1971) (financial condition).

Job-relatedness can only be determined where the criteria for selection are clearly identified. Here, the vagueness of the governing criteria and the defendants' failure to offer any articulable standards to guide the application of these criteria make it impossible to determine whether the background investigation actually served to select applicants according to real differences in job-related qualifications. *See Afro-American Patrolman's League v. Duck*, 503 F.2d 294 (6th Cir. 1974). Accordingly, the district court did not err in holding that defendants failed to demonstrate that the background screening procedure as administered by the Police Department was job-related.

The 1973 Sergeant's Examination. At the preliminary injunction hearing, defendants introduced expert testimony and statistical evidence which purported to establish the concurrent validity[21] and the con-

[21] Concurrent validation is a form of criterion-related validation. *See* note 14 *supra*. Two types of criterion-related validation are professionally recognized: (1) predictive validation,

(Footnote continued on following page)

tent validity[22] of the 1973 sergeant's examination. To support a finding of concurrent validity, defendants offered into evidence a study conducted by Dr. Pounian, who administered the 1973 sergeant's examination to 176 incumbent Chicago police sergeants[23] and then computed the correlations between their scores and their most recent departmental efficiency ratings. Dr. Pounian testified that his computations established the concurrent validity of the sergeant's examination. His testimony was supported at trial by defendants' expert Dr. Philip Ash, who performed additional computations based on data from Dr. Pounian's study.

The district court rejected their conclusion because the study failed to meet the EEOC Guidelines. This finding was based on substantial evidence and we affirm it. First, the use of efficiency ratings as the sole criterion against which the test was validated was defective under the Guidelines in view of the court's finding that those ratings did not accurately measure job performance.[24] *See* 29 C.F.R. §§ 1607.5(b)(3) and (c)(1). The

[21] *continued*
in which test scores are compared with subsequent performance on criteria selected to measure job performance, and (2) concurrent validation, where test scores are compared with current performance on job criteria. *APA Standards* at 26. While predictive validation is preferred, "data obtained in a concurrent study may be used to estimate the predictive validity of a test." *Id.*

[22] "An examination has content validity if the content of the examination matches the content of the job." *Vulcan Society v. Civil Service Commission*, 409 F.2d 387, 395 (2d Cir. 1973). *See* note 14 *supra;* APA Standards at 28.

[23] The 176 sergeants included 88 black/white pairs matched according to age and efficiency ratings.

[24] There was a good deal of testimony revealing the vagaries of the Department's means of measuring efficiency. *See* 385 F. Supp. at 560-61. The efficiency ratings were supposed to be computed from a checklist of separate ratings for quantity of work, quality of work, and other specified indicia of job performance. Defendants' experts computed correlations for each of these ratings as well as for the overall rating. However, supervisors often assigned the overall efficiency score and then manipulated the ratings for each factor to conform to that score. Thus, the specific ratings gave no better indication of actual job performance than the overall ratings.

entire rationale of a criterion-related study requires that the criterion with which test results are compared be a good measure of job performance. APA Standards at 27.

Second, even assuming the validity of the criterion used, the results of the study did not show any correlations for blacks at levels of practical significance. *See* 29 C.F.R. § 1607.5(c)(2). As we have already noted, the EEOC Guidelines require that an examination be validated for both minorities and whites. 29 C.F.R. § 1607.5(b)(5). We do not consider this requirement a mere technicality. *See Albemarle*, 422 U.S. at 435. Where a test excludes minorities from promotion at disproportionate rates, those who use the test must show that its use enhances their ability to predict job performance for minorities as well as whites and thus legitimately excludes minorities because of deficiencies in their qualifications for the job.

The district court also found that the validity of the study was undermined by serious problems as to Dr. Pounian's credibility. That finding is supported by substantial evidence and we will not disturb it.

The defendants further attempted to show that the sergeant's examination had content validity as well as concurrent validity. In support of a finding of content validity, Dr. Pounian testified that a comprehensive job analysis was developed in preparation for the 1973 examination. From this analysis a sergeant's task list was drawn up, and these tasks were broken down into six areas to be covered on the examination: personnel supervision (twenty-five percent); community relations (ten percent); investigatory skills (ten percent); crowd control and special events (five percent); laws, rules, and regulations (twenty percent); and judgment (thirty percent). Dr. Pounian also testified that the items on the examination bore a direct relationship to the tasks performed by police sergeants in each area.

The district court found that the sergeant's examination lacked content validity, based on evidence derived from the concurrent validity study. Defendants' claim of content validity required them to show that the tasks on

the examination substantially represented equivalent tasks on the job.[25] Yet the evidence indicates that incumbent sergeants performing successfully in their positions did not score well on the examination, even though it consisted of questions that allegedly tested functions which they perform regularly on the job. The concurrent validity study showed that when the 1973 sergeant's examination was administered to incumbent sergeants who were performing satisfactorily, their average score was only fifty-three percent, just two percent more than the average patrolman's score of fifty-one percent. The district court noted that the average sergeant could not have made the practical cut-off point on the sergeant's roster even with maximum seniority and a perfect one hundred percent efficiency rating.

In view of the conflicting evidence, the district court was not required to accept the conclusions of defendants' experts that the examination was valid. *See Vulcan Society v. Civil Service Commission*, 490 F.2d 387, 397 (2d Cir. 1973). The court could properly conclude that the evidence of the poor performance of incumbent sergeants on the examination instead demonstrated that it was not content valid.

3. Sexual Discrimination

The unchallenged findings of the district court present a clear pattern of sexual discrimination in the Chicago Police Department. Women in the Department have been traditionally segregated into separate positions as policewomen or police matrons. The number of these positions has been severely limited. In August 1973 only 115 women held sworn positions within the Department, which employed at that time approximately 13,500 sworn personnel. At the time of the preliminary hearing in 1974, this number had increased to only 160, or about one percent of the Chicago police force. Policewomen and police matrons were principally assigned duties

[25] The EEOC Guidelines provide that evidence of the content validity of an employment test may be accepted as evidence of job relatedness for tests "that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question." 29 C.F.R. § 1607.5(a).

relating to the processing and custody of female prisoners and certain duties in the Youth Division. Women were not entitled to compete on the patrolman's entry examination nor assigned to patrol work. Only two women held command positions in the Department, and their authority extended only to other women. These established policies and practices continued after the 1972 amendments to Title VII brought municipalities within the ambit of that statute. Evidence that women have been "limited, segregated and classified" in employment within the department is undisputed in this case. These practices could be justified only by proof that sex is a bona fide occupational qualification of those positions from which women have been excluded. 42 U.S.C. § 2000e-2(e)(1); *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 232 (5th Cir. 1969); *Bowe v. Colgate, Palmolive Co.*, 416 F.2d 711, 715-16 (7th Cir. 1969). The City neither asserted nor attempted to prove that only men could perform the full range of police duties.

Instead, the City urges reversal of the district court's holding that the Department's practices violated Title VII on the ground that the initiation of a pilot program to study the feasibility of female patrol officers following the 1972 amendments to the Act was a "rational approach" to compliance. Even assuming that the supporters of the 1972 amendments envisioned some grace period for municipalities to meet the requirements of Title VII, however, the district court concluded, and we agree, that the City's actions did not exhibit an intent to promptly and voluntarily end discrimination. Under the 1972 amendments, Title VII became applicable to municipalities on March 21, 1972, and the Government brought suit alleging sexual discrimination on August 14, 1973. Yet not until June 1974 were the first women experimentally assigned to patrol duties under the pilot program. Not until April 1975 were women first entitled to compete with men on an entry examination for patrol officer positions. And not until June 1975 did the City announce a policy of nondiscrimination against women in Police Department assignments. Moreover, these latter actions were taken under compulsion of the court's November 7, 1974 preliminary injunction.

The City further contends that it has not illegally discriminated against women because there is evidence of sexual discrimination in other law enforcement agencies. As the district court correctly observed, it is no defense to a charge of discrimination that not everyone else is in compliance with the law. We therefore affirm the district court's holding that sexual discrimination within the Police Department violated Title VII.

C. THE EQUAL PROTECTION CLAUSE

The district court stated that:

> [t]he evidence shows that the City defendants have knowingly engaged in racial and sexual discrimination in employment and promotion within the Chicago Police Department. Accordingly, they have knowingly violated the equal protection clause of the Fourteenth Amendment. . . . 411 F. Supp. at 245.

We reverse the district court's holding of a constitutional violation as to racial discrimination and remand the constitutional sexual discrimination issue for further proceedings.

Our disagreement with the district court on the racial discrimination issue is the result of the Supreme Court's decision in *Washington v. Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976), handed down after the district court's final order. In *Washington*, the Supreme Court held that racial discrimination within the meaning of the equal protection clause could not be demonstrated solely by a racially disproportionate impact. Rather, the Court held, for constitutional purposes it is necessary to show an intent or purpose to discriminate by reason of race. Thus, the Court has differentiated between the standard necessary to prove a violation of Title VII and the standard required under the Constitution. Under Title VII a disproportionate racial impact remains enough to establish a prima facie case while under the Constitution evidence of intention must be proved. 44 U.S.L.W. at 4791-92, 4794.

There is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination.[26] The Department merely followed the command of Illinois law in administering tests which on their face were racially neutral. When the district court stated that the City knowingly engaged in racial discrimination, it may have been referring to the fact that the Department must have been aware of the racially disproportionate impact of those examinations. Under *Washington*, this is not enough to show intent for purposes of the equal protection clause. *See* 44 U.S.L.W. at 4792-93. Accordingly, we hold that the hiring and promotion policies of the Chicago Police Department did not violate the Constitution.

We remand the case to the district court as to the constitutional sexual discrimination issue because the district court, equating the equal protection clause with Title VII, failed to deal with the difficult problems which arise when a claim is made that a sex-based classification violates the equal protection clause. *See, e.g., Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); Note, *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 49, 95-103 (1975). On remand, the district court should also face the question of whether the intent requirement which *Washington* imposed on claims of racial discrimination also applies to claims of sexual discrimination and if so, whether the plaintiffs have satisfied the requirement in this case.[27]

IV

Based on its findings, the district court entered a final decree designed both to remedy the effects of past discrimination and to ensure that the City will comply with the law in the future. The City, the individual defendants, and the Burauer plaintiffs have appealed various aspects of the decree. We shall consider each of their contentions individually.

[26] This statement is not intended to apply to the individual claims of the Robinson plaintiffs, which are not at issue in this appeal.

[27] We note that the district court's consideration of these issues is contingent upon the willingness of the parties to further litigate them.

A. Mandatory Quotas

The City and the individual defendants challenge the propriety of the mandatory quotas for hiring and promotion which the district court imposed as long term goals. The court ordered the City to appoint at least sixteen percent females and forty-two percent black or[28] Spanish-surnamed males to fill future patrol officer vacancies. It also required that forty percent of the patrol officers promoted to the position of sergeant be black or Spanish-surnamed. These standards were to be in force until further order of the court.[29]

We hold that the district court did not abuse its discretion in imposing mandatory quotas upon the Police Department. Under Title VII Congress has equipped the courts with wide discretionary power to remedy statutory violations by fashioning the most complete relief possible. *See* 42 U.S.C. § 2000e-5(g); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976); *Albemarle*, 422 U.S. at 421. The district court had a duty to construct a remedy that would both eradicate as far as possible the past effects of discrimination and prevent discrimination in the future. *Albemarle*, 422 U.S. at 417-18. Moreover, even though Title VII did not become

[28] The decree actually uses "and" rather than "or." However, the context makes it clear that the disjunctive form was intended.

[29] In a postdecree order issued September 7, 1976, the district court suspended the hiring quotas to allow the City to appoint patrol officers from the roster of 1,091 candidates derived from new examinations given by the Department in 1975. The results of that examination, which the district court found not to have a discriminatory impact against racial minorities or women, had not been available when the court entered its final order. Although we are not considering appeals from the September 7 order as part of this case, we have ordered that it be made part of the record to ensure that appeals from the imposition of mandatory quotas contained in the final decree are not now moot. After considering the statements of the parties on this question, we hold that the propriety of the quotas is not a moot issue because they are still in force as to promotions and because they could be reinstated as to hiring at any time.

applicable to the City until 1972, the court had an obligation to correct the present consequences of discriminatory conduct that occurred before that date. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 795 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Local 189, Papermakers v. United States*, 416 F.2d 980, 987-88 (5th Cir. 1970), *cert. denied*, 397 U.S. 919 (1971); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505, 515-16 (E.D. Va. 1968).

At least seven circuits, including our own, have held that a court may authorize the use of mandatory racial or sexual quotas in the exercise of its remedial powers under Title VII. *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1973); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 273-74 (4th Cir. 1976); *Rios v. Steamfitters Local 638*, 501 F.2d 622, 628-31 (2d Cir. 1974); *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 377 (8th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544, 552-3 (9th Cir. 1971); *United States v. Local 38, IBEW*, 428 F.2d 144, 149-51 (6th Cir. 1970); *Local 53, Heat Workers v. Vogler*, 407 F.2d 1047, 1053-54 (5th Cir. 1969). In addition, this court has held that such preferential relief violates neither the equal protection clause nor any provision of Title VII. *Crockett v. Green*, 534 F.2d 715, 718 (7th Cir. 1976); *Southern Illinois Builders*, 471 F.2d at 683-86.

Preferential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of each case. In this case the district court initially rejected numerical relief in its preliminary injunction order in the hope that a remedy could be fashioned by agreement of the parties. In its final order, however, the district court determined that numerical standards were necessary in view of the City's recalcitrance in voluntarily taking steps to correct the racial and sexual imbalances within the Police Department. In light of the frustrations which the district court has faced since the beginning of this litigation in attempting to construct a remedy that did not require mandatory quotas and its caution in finally imposing

them, we cannot say that its action was an abuse of discretion.[30]

The Burauer plaintiffs also challenge the quotas imposed by the district court because, they assert, the requirement that sixteen percent of new appointments to patrol officer positions be women is both arbitrary and too low in proportion to the number of female applicants. There is substance to this contention because the sixteen percent figure appears to be what was left after the district court allocated equal quotas of forty-two percent for both white and nonwhite males. Moreover, 25.9 percent of the applicants for the 1975 patrol officer's examination were female.

However, the district court itself noted these problems in an order issued on March 31, 1976 which is part of the record in this case. We therefore decline to interfere with the district court's discretion until it has had a chance to correct any underrepresentation of females that has become apparent since its final decree.[31]

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[30] Our conclusion that the district court only resorted to the use of mandatory quotas when no other solution was possible is buttressed by the September 7, 1976 order in which the hiring quotas were suspended because new testing procedures yielded nondiscriminatory results. *See* note 29 *supra*.

We also hold that the district court did not abuse its discretion in imposing promotion quotas for Hispanics even though they did as well as whites on the sergeant's examination. In view of the strong evidence of discrimination against Hispanics with respect to hiring and their underrepresentation in command positions, the court may well have determined that special protection was advisable during the period of adjustment in the Department's employment practices.

[31] Another reason for not granting specific relief to the Burauer plaintiffs at this time is that females are not underrepresented on the roster derived from the 1975 examination, which is the current source for new appointments to the Department. *See* note 29 *supra*.

B. THE INDIVIDUAL CLAIMS OF THE ISAKSON DEFENDANTS

The Isakson defendants, representing candidates for patrol officer positions on the 1971 patrolman's roster, contend that the district court's final decree illegally deprived them of vested rights by permitting the City, at its option, to disregard the 1971 roster in making new appointments as long as the mandatory quotas were met.[32] We agree, and vacate this aspect of the decree.

As we have previously noted, the hiring procedure of the Chicago Police Department is governed by the Illinois Municipal Code. That statute unequivocally states that only persons who pass a qualifying examination may be placed on the eligibility roster for a position covered by the Code and that hiring for that position must be from the eligibility roster, in rank order. Ill. Rev. Stat., ch. 24 §§ 10-1-12, 10-1-14. Of course, insofar as these provisions, as applied, violate the command of Title VII, their operation must be suspended under the supremacy clause. Moreover, the City has an affirmative obligation to develop new tests, within the constraints of state law, which do not produce illegally discriminatory results. But the fact that the general testing procedure set up by the Illinois legislature, as put into practice by the City, produced results which conflicted with federal civil rights legislation did not give the district court an unbridled license to replace the state's method for selecting police officers with its own. "When a state statute is assailed because of alleged conflict with a federal law, the same consideratons of forbearance, the same regard for the lawmaking power of States, should guide the judicial judgment as when this Court is asked to declare

[32] The final order, at Part I, subpart 8(b), 411 F. Supp. at 249, laid out the numerical quotas which we have previously discussed and then went on to state: "So long as they comply with this requirement of this decree, the Chicago defendants are authorized to appoint, at their election, but in rank order, persons who remain on the eligibility lists based upon the 1971 Patrolman's Examination and the 1972 Policewoman/Matron's Examination. . . ."

a statute unconstitutional outright." *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 546 (1959) (Frankfurter, J., dissenting). Accordingly, the district court should have constructed its remedy to preserve as much of the Illinois statutory scheme as possible.

It failed to do this when it allowed the City to depart from the 1971 and 1972 rosters in selecting new patrol officers. It was unnecessary to permit the City to discard the rosters entirely in compelling it to correct racial and sexual imbalances in the Police Department. The forty-two percent of the patrol officers who would be hired under the decree after the fifty-eight percent quotas for blacks, Hispanics, and women have been filled must be selected from the applicable eligibility rosters, in rank order.[33]

The Isakson defendants also ask us to hold that persons on the 1971 roster must be hired ahead of persons on the roster derived from new examinations given by the Chicago Civil Service Commission in 1975. We decline to rule on the precedence of the 1971 examination vis-à-vis subsequent examinations. The district court's final order, from which this appeal is taken, was issued before the results of the 1975 examination were available. It therefore would be inappropriate at this point for us to decide the difficult issues of state law that may arise in determining the rights of persons on the 1971 roster in light of the existence of the new roster derived from the 1975 examination.[34] We limit our

[33] The decree, while not requiring nonquota patrol officers to be hired from the rosters, curiously does appear to require that blacks, Hispanics, and women within the fifty-eight percent mandated by the quotas come from the rosters. The decree states, at Part I, Subpart 8(b), 411 F. Supp. at 249, that the quotas shall be followed "subject to the availability of qualified black, Spanish-surnamed and female applicants." "Qualified" in this context seems to refer to candidates who have been listed on an eligibility roster pursuant to Illinois law. While none of the parties is appealing this portion of the decree, we note our approval of this requirement.

[34] We again note the existence of the district court's order of September 7, 1976, in which it ordered subsequent hiring to be from the roster derived from the 1975 examinations to the exclusion of persons on the 1971 roster. A separate appeal from that order has been taken to this court.

holding in this case to the statement that the City must utilize the results of some examination given pursuant to Illinois law in appointing patrol officers.

C. THE INDIVIDUAL CLAIMS OF THE ARADO DEFENDANTS

The Arado defendants, representing patrolmen on the 1973 sergeant's eligibility roster, challenge the portion of the final order that permitted the City to make permanent the temporary promotions to the rank of sergeant which had been effective since June 1975. The Arado defendants contend that even if quotas are to be imposed, the district court erred in allowing the City to go outside the 1973 roster except to correct racial and sexual imbalances. For the reasons we stated with respect to the Isakson defendants, we agree, and vacate this portion of the final order.

Promotions within the Police Department, like appointments, are strictly governed by the Illinois Municipal Code. The Illinois legislature has limited promotions to any position covered by the Municipal Code to the top three candidates on the relevant eligibility roster. Ill. Rev. Stat. ch. 24, § 10-1-13. While the district court was required under Title VII to suspend this statutory scheme to remedy illegal discrimination, it should not have authorized actions contrary to the Municipal Code which were not necessary to achieve this goal. The temporary appointments to sergeant were made completely at the discretion of the Police Department. The Code appears to have been designed exactly to prevent this exigency. Therefore, we hold that those appointments cannot be made permanent. Promotions to sergeant after the forty percent quota has been filled[35] must be made from a roster derived pursuant to state law.

[35] Fulfillment of the forty percent promotion quota, as in the case of the hiring quota, is subject to the availability of "qualified" black and Hispanic applicants. Again, this language presumably directs the Police Department to select black and Hispanic patrol officers to fill the quota from the applicable eligibility list—in this case, the 1973 roster.

D. THE INJUNCTION AGAINST PAYMENT OF REVENUE SHARING FUNDS

The City defendants finally contend that the district court exceeded its authority in continuing to enjoin the federal government from paying the City $76,000,000[36] in revenue sharing funds under the State and Local Fiscal Assistance Act of 1972. We hold that the district court's action, based on the Act's nondiscrimination provision, was both in tune with the intent of Congress in enacting the statute and a proper exercise of equitable discretion in compelling the City to find a method of hiring and promoting police officers, consistent with state law, that did not discriminate against racial minorities and women.[37]

Section 122(a) of the Fiscal Assistance Act, 31 U.S.C. § 1242(a), states:

> No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the Act].

[36] The amount withheld appears to be at least this much. The district court noted that $95,000,000 might be a more accurate figure while the City claimed that over $114,000,000 has been withheld.

[37] Congress has recently passed, and the President has signed, a bill adding amendments to the Fiscal Assistance Act that specifically grant federal courts the power to withhold funds for violations of the Act's nondiscrimination provision. *See* State and Local Fiscal Assistance Amendments of 1976 § 8, Pub.L. No. 94-488, 90 Stat. 2341. These amendments, which do not take effect until January 1, 1977, have been made part of the record in this case. The Robinson plaintiffs have urged that the amendments clarify the original intent of Congress to permit the district courts to withhold funds. The City replies that the fact that Congress amended the Act to add this power indicates that it did not previously exist. We will not resolve this probably unanswerable question because in determining that the district courts presently have the power to withhold funds we do not rely in any way on the passage of the amendments.

The district court concluded that the City had violated this provision, based on the court's prior finding of employment discrimination in violation of Title VII and on the admitted use of federal revenue sharing funds to pay police salaries. The validity of the district court's conclusion is buttressed by the regulations issued by the Secretary of the Treasury under section 142(a) of the Fiscal Assistance Act, 31 U.S.C. § 1262(a), which state in pertinent part:

> In any program or activity funded in whole or in part with entitlement funds, a recipient government may not . . . subject any individual to discrimination on the ground of race, color, national origin, or sex in its employment practices. 31 C.F.R. § 51.53(a).

Moreover, these regulations state that the standards to be used in determining whether employment discrimination exists for purposes of the Fiscal Assistance Act are ordinarily the same as the standards used by the EEOC under Title VII. 31 C.F.R. § 51.53(b). Since regulations promulgated pursuant to rulemaking authority granted by statute have the force of law, *see, e.g., Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 384-85 (1947), we hold that the district court was correct in finding that the Department's hiring and promotional practices violated the Fiscal Assistance Act as well as Title VII.

Therefore, the only issues remaining on appeal are whether the district court had the power to order the withholding of the federal revenue sharing funds which are distributed under the Fiscal Assistance Act because the Act's nondiscrimination provision had been violated and whether, even if the court had that power, its action was a proper exercise of discretion. The question of power can be resolved by examining the structure of the Act, as illuminated by the administrative regulations promulgated under it.

The Act provides alternative procedures for enforcement of section 122. First, the Secretary of the Treasury must seek voluntary compliance by asking the governor

of the state where the violation is occurring to correct it. 31 U.S.C. § 1242(b). The Secretary took this required step in April 1974. *See* 395 F. Supp. at 334.

If the governor fails or refuses to secure compliance, the Secretary may either refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted, initiate administrative proceedings,[38] or take any other actions provided for by law. 31 U.S.C. § 1242(b). In this case, the Secretary pursued the first option, and the Attorney General followed the Secretary's recommendation by amending the Government's complaint to allege violation of the Fiscal Assistance Act. Under section 122(c) of the statute, the Attorney General may request "such relief as may be appropriate, including injunctive relief." 31 U.S.C. § 1242(c).

In view of this statutory scheme, the power of the district court to withhold revenue sharing funds is apparent. The phrase "injunctive relief" in section 122(c) can have only two possible applications: to the discriminatory conduct itself and to the payment of revenue sharing funds. It would be anomalous to construe "injunctive relief" to allow a court to directly interfere with the activities of state or local governments but not to permit the less drastic step of enjoining the payment of federal funds in an effort to force the noncomplying government to itself choose a means of ending illegal discrimination. The former involves a greater abridgement of state or local autonomy by a federal court than the latter, and therefore the latter is to be preferred on federalism grounds.

Moreover, to deny the district court the power to withhold revenue sharing funds would seriously cripple it in its efforts to enforce the nondiscrimination provision and would be contrary to the established policy of permitting a court to use the full range of its discretion in fashioning equitable remedies. "When Congress entrusts to an equity court the enforcement of prohibitions contained

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[38] The administrative proceedings are provided for in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946). A court is not limited to simply prohibiting action in violation of a statute, but may also require affirmative acts to be taken to assure compliance. *See, e.g., Green v. Connally*, 330 F. Supp. 1150, 1177-78 (D.C. D.C.) (three-judge court), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

Finally, the regulations promulgated by the Secretary governing enforcement of the nondiscrimination provision specifically authorize a district court to withhold revenue sharing funds in a civil action brought by the Attorney General.[39] In light of the deference which we must give to the interpretation of a statute by the agency assigned that task by Congress, as well as the other factors we have enumerated, we hold that the district court had the power to withhold revenue sharing funds in order to secure compliance with the Fiscal Assistance Act's nondiscrimination provision.

The City advances two arguments to support its contention that the district court lacked the power to withhold revenue sharing funds. First, it asserts that funds may not be withheld unless the state or local government in question is out of compliance with a court order, and that it has fully complied with all the affirmative requirements of the district court's preliminary injunction and final order. As a matter of law, it is dubious whether a district court's power to withhold funds is contingent upon the defendant's disobedience of

[39] 31 C.F.R. § 51.59(d) states in pertinent part:

> Nothing in these regulations is intended to preclude the United States, in a civil action initiated by the Attorney General of the United States pursuant to section 122(c) of the Act, from seeking, or a court from granting, an order to require the repayment of funds previously paid under the Act, or an order that the payment of funds under the Act be terminated or withheld.

the court's own injunction or order.[40] In addition, however, the City's statement that it has fully complied with the district court's injunction and final order is at odds with the district court's finding that "the City defendants have done virtually nothing to alleviate the effects of their discrimination" since the issuance of the preliminary injunction, contrary to the mandate of that injunction and the Fiscal Assistance Act. *See* 411 F. Supp. at 244. The key to complying with the preliminary injunction and ending discrimination within the Police Department was the development of new tests that would produce nondiscriminatory results. At the time the district court entered its final order, the City had not yet demonstrated that it was willing to construct nondiscriminatory examinations, and the withholding of revenue sharing funds during the interval between the issuance of the preliminary injunction and the entry of the final order was properly perceived by the district court as a necessary tool in prodding the City toward ending discrimination.

[40] The City relies on *Adams v. Richardson*, 351 F. Supp. 636 (D.C. D.C.), *aff'd in part*, 480 F.2d 1159 (D.C. Cir. 1971) *(en banc)*, and *Lee v. Macon County Board of Education*, 270 F. Supp. 859 (M.D. Ala.) (three-judge court) *(per curiam)*, *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967), as authority for this proposition. Both of those cases, however, dealt with the authority of the Secretary of Health, Education and Welfare to withhold federal funds in the face of a federal court order. The courts in *Adams* and *Lee* refused to allow executive branch officials to interfere with the equitable discretion of federal courts in choosing particular remedies to end discrimination. There are regulations promulgated under the Fiscal Assistance Act permitting the Secretary of the Treasury to withhold revenue sharing funds on his own authority pending action by a court; following the logic of these cases they require that the court has not yet resolved the question of withholding. 31 C.F.R. § 51.59(c). But the power of the court itself to withhold funds when a state or local government is subject to a court order enjoining discrimination—particularly as in this case when the court that seeks to withhold the funds is the same court that issued the injunction—presents far different considerations. The danger of interference with the discretion of the district court entering the substantive order designed to end discrimination is much less.

Furthermore, the district court retained the power to continue the withholding of funds after it had issued its final order. Given the recalcitrance of the City in devising its own remedy, the court could logically require that portions of the funds be paid out only after the City had taken steps to comply with the order.

The City's second argument is that the district court lacked the power to withhold funds absent a constitutional violation. But as we have already noted, discriminatory conduct which violates Title VII is enough, without proof of a constitutional infirmity, to establish a violation of the Fiscal Assistance Act's nondiscrimination provision. It would be anomalous to not permit the district court to enforce that provision, which is itself statutory, simply because the City has not violated the Constitution as well as Title VII.

The City also asserts that even if the district court had the power to withhold funds, it abused its discretion in doing so in this case. We disagree. The district court has demonstrated unusual patience with the defendants throughout the course of this litigation. We have already alluded to the City's failure to take affirmative steps to end discrimination in the Police Department following the preliminary injunction in 1974. In addition, the City's unilateral suspension of the interim hiring agreement and its failure to promptly eliminate purposeful sexual discrimination in the Department after entry of the preliminary injunction lend support to the district court's decision both initially to withhold revenue sharing funds and to continue to withhold them until compliance with its order is assured.

The City further urges that the district court should only have withheld that portion of the funds allocated to the Police Department, rather than the entire sum earmarked for the City of Chicago, because any discrimination occurred solely within the Department. The City relies on *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972), where this court held that a district court could not enjoin the payment of federal funds to Chicago's Model Cities Program because of discrimination in federally financed activities of the Chicago Housing Authority.

The key to the *Gautreaux* decision was that an insufficient nexus existed between the failure of the Chicago City Council to approve public housing sites in predominantly white areas and payments by the Department of Housing and Urban Development to the Chicago Model Cities program, which was untainted by discrimination. This case presents different facts. In contrast to the situation in *Gautreaux*, all of the funds withheld by the district court were to be paid to one set of local officials pursuant to one statute. Also, between 1972 and 1974, when payments were suspended, 97.7 percent of the revenue sharing funds paid to the City were allocated to public safety, with 75 percent of those funds going directly to the Police Department. Thus, the relationship between the funds withheld and the discriminatory conduct at issue was considerably closer in this case than in *Gautreaux*. Moreover, there was evidence that if the district court withheld only part of the funds the City might change the allocation of funds to the Police Department in order to avoid the effects of the district court's order. *See* 395 F. Supp. at 344. Accordingly, we hold that the district court did not abuse its discretion in withholding all of the funds earmarked for the City of Chicago under the Fiscal Assistance Act.

The judgment of the district court is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

PELL, *Circuit Judge*, dissenting.

Being of the conviction that some one hundred millions of dollars of federal revenue sharing funds were improperly and needlessly withheld from the City of Chicago and that what should have been stayed was the equitable hand of the district court rather than the flow of essential operating funds to one of the largest metropolises of this country, I respectfully dissent from that portion of the majority opinion dealing with the withholding[1] of the revenue sharing funds.[2]

We need not take judicial knowledge of the financial plight of large cities, that is a matter of common knowledge; yet when a reading of the necessarily extended opinion written by Judge Swygert is completed we find that only one paragraph has been devoted to whether the withholding of this substantial sum constituted such an abuse of equitable discretion as to require reversal. Irrespective of whether the district court had the power it exercised with regard to these funds, and I generally entertain the idea that a federal court acting in equity inherently must and does possess the power to fashion a remedy appropriate to the accomplishment of proper ends,[3] it appears to me from a review of the reported proceedings[4] that the district

[1] Although the funds were escrowed, the district court refused to place the withheld funds in an interest-bearing account.

[2] Other than with regard to the withholding issue, I am in general agreement with the result reached in the majority opinion. Although basically confining my dissent to the matter of the withheld revenue sharing funds, I will, after discussing that issue, set forth a few observations which I believe to be appropriate to other matters raised by the present litigation.

[3] In an equity case, the nature of the violation determines the scope of the remedy. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). This would not appear to me to be the basis for justifying a remedy where there has been no violation or justifying a remedy substantially broader than that called for by the violation.

[4] *United States v. City of Chicago*, 385 F.Supp. 540 (1974); 385 F.Supp. 543 (1974); 395 F.Supp. 329 (1975); 411 F.Supp. 218 (1976); 416 F.Supp. 788 (1976); 420 F.Supp. 733 (1976). (All in the Northern District of Illinois, and all references in this dissent, unless otherwise noted, to "district court" will be to that court.)

court, assuming for the sake of the argument that it possessed the power it exercised, prematurely and improvidently exercised it.

The reported cases referred to above as well as the majority opinion set forth in considerable detail the events and happenings in this protracted litigation which has occupied an inordinate amount of time of the district court and a substantial amount of time of this court in its several trips here. Nevertheless, it appears advisable to me to set forth the salient factors which appear to me to have culminated in the improper action of withholding.

On April 24, 1974, the district court consolidated various cases charging discrimination in police department practices.[5] More than two months prior to that date, following unsuccessful efforts in administrative proceedings to cut off the flow of revenue sharing funds to Chicago (the City) certain of the individual plaintiffs filed a civil suit in the district court of the District of Columbia (D.C.) to achieve the same objective. The City *was not* made a party although it was aware of the litigation. The D.C. litigation had not been met with success as of November 7, 1974, at which time Judge Marshall entered a preliminary injunction in the Northern District of Illinois.[6] The Marshall injunction in no way was concerned with the matter of the disbursement of revenue sharing funds. Although the D.C. plaintiffs were also plaintiffs in the Northern District of Illinois, where the City was a party, the efforts at stopping the money to the City were at that time confined to the D.C. litigation.

The Marshall preliminary injunction that was granted, putting it very simply, prohibited further hiring of patrol officers and the advancement of officers to the rank of sergeant discriminatorily toward females and black and Spanish surnamed males. The district court recognized that because of the pending action the

[5] 385 F. Supp. 540.

[6] 385 F. Supp. 543.

City had refrained from hiring patrol officers and from promoting officers to the sergeant rank, and that "[e]ventually, the shortage of patrol officers will become critical in a city the size and complexity of Chicago."[7] The court nevertheless was of the opinion that the injunctive relief "would be required as the *only effective remedy* pending development by defendants of valid testing procedures."[8] (Emphasis added.) Nowhere do I find in the record of this case any persuasive reason for thinking that if this injunction had been enforced by normal and traditional means available to equity courts the desired objective of elimination of discrimination could not have been achieved without resorting to the extraordinary procedure of stopping operating funds, the lifeblood of a complex metropolis, which city in this case ultimately had to turn to commercial banks for loans with which to meet the crisis when the federal funds were in fact stopped.

Further, it is quite clear that the City had no intention to violate the crisp and explicit terms of the preliminary injunction. Indeed in the month following its entry, the parties had reached an agreement which the court approved on December 16, 1974, for the hiring of police officers according to a specified schedule. The purpose of the agreement was to alleviate a critical shortage of police officers attributable in part at least to the preliminary injunction.[9] It is patent, of course, that those plaintiffs concerned with non-discriminatory hiring of police officers were in agreement that the scheduled hirings were not discriminatorily tainted. Equally obviously the agreed order did not purport to correct any existent disproportionment, for the preliminary injunction was keyed only to future hiring and did not mandate discharge of existing police officers to achieve a balance in the existing force. Indeed, the preliminary injunction itself did not require any one to be hired; it merely, as stated, enjoined discrimination when hiring did occur.

[7] *Id.* at 547.

[8] *Id.* at 548.

[9] 395 F. Supp. at 336.

As of December 16, 1974, the defendants had every reason for thinking that everyone was well on the way to an amicable solution to formidable problems. The hiring practices of the City based upon examinations which had been thought of as achieving job-related results had been found wanting by a federal judge who had determined that the resulting disproportionate impact required judicial correction in future hiring practices. Following negotiation by the litigants steps were outlined for going forward with interim hiring, and in the meantime work was underway for devising new examinations which might happily achieve both job-relatedness and a racially and sexually proportionate situation.

The rosiness vanished from the picture two days later, December 18, 1974, when Judge John Lewis Smith, Jr., in the D.C. district court entered an injunction enjoining the Office of Revenue Sharing officials from making further payments of federal revenue sharing funds to the City until further order of the court and in no event until the entry of a final order in the Northern Illinois litigation with the defendants in that litigation (they were still not parties in the D.C. litigation) giving formal assurances of compliance and continuing to monitor compliance thereafter. Inasmuch as Judge Smith's injunction was based upon the November 7 decision of Judge Marshall, we must turn to that to attempt to discern why the D.C. judge thought it necessary to impose what I regard as an extraordinarily punitive sanction. There could have been nothing before Judge Smith to show lack of compliance or lack of intent to comply with the November injunction; nor was there any basis for thinking that the final order of injunction, if one were entered, would be any broader than the November preliminary injunction. Indeed, the final injunction was narrower in scope.[10]

[10] The district court had preliminarily enjoined the use of departmental efficiency ratings based on a finding that they were racially discriminatory. In its final decree the court reversed itself and found that such efficiency ratings were not discriminatory. The same is true for assignments within the department which the court found to be nondiscriminatory. The court also rejected claims that a 1970 lieutenant's examination was invalid under Title VII.

When we turn to the November findings of Judge Marshall upon which the withholding injunction of Judge Smith was based, we must note that the judge who made those findings regarded them only as establishing "a *prima facie* case of *de facto* discrimination in employment and promotion."[11] (Italics in the original.) The prima facie case was established by the resultant imbalance which followed the past hiring and promotion practices and did not rest upon any determination of an intentional and invidious determination to discriminate. This imbalance, however, was deemed sufficient to warrant a preliminary injunction. The infirm basis that the findings and preliminary injunction of November constituted for Judge Smith's order is clearly demonstrated by the following characterization by Judge Frank in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953):

> The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness. It serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began.

Further, it is to be noted that Judge Marshall rested the granting of the preliminary injunction on the double prongs of constitutional and statutory deficiency. But as we now know from the subsequently decided *Washington v. Davis*, ... U.S. ..... (1976), official acts are not unconstitutional solely because they have a racially disproportionate impact.

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[11] 385 F. Supp. at 552

Eventually, after some unsuccessful efforts to remove the ban on receipt of the revenue sharing funds by way of collateral attack in the Illinois district court and this court, the City hied to Washington, as with hindsight it should have in the first place, and, after unsuccessfully attempting to secure direct relief there, did secure the transfer of the D.C. proceedings to the Northern District of Illinois whereby they became a part of the ongoing litigation before Judge Marshall. It might appear that the story was now ready for a happy ending but in the meantime the City's expeditious negotiation following the November injunction provided the stumbling block rather than the paving stone to early solution of problems. Under the December agreed order, which, it must be understood was not an order emanating from Judge Marshall to which he secured agreement but was instead one upon which the parties had agreed and which the judge then approved, the first group of applicants were to report for training on January 6, 1975. On January 2, 1975, the Acting Superintendent of Police issued the following notice:

> It now appears unlikely that the federal revenue sharing funds due on Monday, January 6, 1975, will be received by the City on that date. Inasmuch as a substantial portion of these funds was to be used for the payment of police salaries, the Comptroller has suggested, and I have directed, that the proposed hiring of 200 police candidates on Monday, January 6, 1975, be deferred until this matter is resolved in the pending litigation in the federal court. I have also directed that the 200 candidates scheduled to report for training on Monday, January 6, 1975, be immediately notified of this unfortunate, but necessary decision.

The novelist who charts his plot line so as to embroil his characters in confrontations finds timing a necessary instrument. As in the case of the contrived plot, if something had happened earlier or later, how different the results would have been! Here if the withholding injunction had come down before the negotiations had reached agreement, it is entirely reasonable to think that the City would have first addressed itself to getting

its operating funds restored. I have no reason for thinking that the City would not have been successful before Judge Marshall, who was aware at the time that the City was progressing toward the development of a new patrol officers' examination which, hopefully would meet the requirements of law,[12] and who had recently expressed the opinion that "[i]t is far better in cases of this nature that the remedy come from the parties rather than the court."[13] There simply would have been insufficient motivation before the court to require the continuance of the crippling suspension of revenue sharing fund payments. Conversely, if the order by Judge Smith had been delayed until after the agreed order plan had been implemented, Judge Marshall when asked to reconsider Judge Smith's injunction when it was properly before him would have been able to do so in the light of the fact that the City was not only obeying the purely negative aspects of his November injunction by not hiring or promoting but was also affirmatively going forward with a negotiated plan for elimination of the disproportionate aspects resulting from practices found by him to be deficient statutorily and constitutionally.

The timing, however, was not right and early January of 1975 found one of the largest municipalities in the nation facing the immediate loss of nearly 20 million dollars which had been budgeted by it and which the paying Government had thus far intended to pay, not doing so solely because of a court injunction. The prospect was that a like amount would be stopped each quarter thereafter unless the injunction could be lifted. Quite understandably, the City finding uncertainty introduced as to the matter of payment of those already on the payroll abandoned its planned departmental increases and turned its attention to getting itself back on the federal payroll. The same period of time found a federal judge, who had regarded the agreed order as permissive although the parties had cast it in mandatory

[12] 385 F.Supp. at 548.

[13] *Id.* at 561.

language.[14] now incensed at the ex parte failure to comply with that order, which refusal the district court later characterized as "the arrogant, contumacious refusal by the City defendants to honor their interim hiring agreement and our order approving it of December 16, 1974."[15] The confrontation and its resultant deleterious effect on the working out of the societal problems inherent in this litigation were inevitable as was the snowballing crystallization of antagonistic attitudes between these two branches of government. Early in the period of confrontation it might have seemed that the simple judicial answer would have been that jurisdiction of the withholding injunction now being in Illinois, the withholding injunction would be vacated until further order of the court provided that there was prompt compliance with the December agreed order. This would seem to have been the position of the federal government which on January 20, 1975, responded, consistently with the position it had taken when the action was pending in the District of Columbia, that the withholding order should be modified as requested by the City. The Government added, however, that in view of the City's refusal to implement the interim hiring agreement and to give assurances that it would comply with the court's order of November 7, 1974, *further* revenue sharing payments should not be made to the City. Although the Government thereby was retreating from its earlier position that the flow of the funds should not be stopped, nevertheless the fact is patent that the appropriate authorities of the Government having to do with the payment of these funds were willing to have the payment released that should have been paid on January 6, 1975. Further, while the City had perhaps not given formal assurances that it would comply with the November order, there had been no failure to comply nor any indication that there would be such a failure. The only real factor in the Government's new position on future payments was the failure of the City to proceed with the interim hiring notwithstanding the cutoff of revenue sharing funds. Indeed, as late as

[14] 395 F.Supp. at 346.

[15] 411 F.Supp. at 224.

January 5, 1976, the court stated that the Office of Revenue Sharing defendants had been ambiguous and faltering on the matter of withholding and that "it is not clear that they would continue to withhold those payments should the injunction be dissolved."[16] The court also at that time observed that the Department of Justice had taken an ambiguous stance.[17]

Also, when early in 1975, the district court had before it the matter of modifying or vacating the D.C. injunction, it could have resorted to traditional methods of enforcement of injunctions, as it was urged to do by the plaintiffs as to the mandatorily worded interim hiring agreed order. Although expressing regret subsequently that it had not done so,[18] the court took what appeared to it at the time to be the wiser course[19] and neither compelled compliance by traditional methods with the interim hiring order nor ruled on the City's motion to modify the D.C. injunction. Instead the court deferred these matters until the trial was underway, and they were not the subject of formal judicial action until the memorandum decision of April 21, 1975. In the meantime positions had solidified, and the resultant aggravations increased the difficulties of negotiated solutions which had seemed so happily on the way prior to the granting of the D.C. injunction. Reality, of course, requires recognition of the fact of litigation life that, while parties have relatively great freedom in negotiating with each other toward an agreement, a judge who believes, rightly or wrongly, that his order has been willfully violated is less amenable to a bargaining process to secure compliance.

Another fact which appears inescapable to me is that at the time these early 1975 motions were before the court, the course which appeared wiser to the court was also probably the easier way. A last resort remedy, which I consider the withholding of revenue sharing funds to be, implicitly is the one that is most likely to be

[16] 411 F.Supp. at 245.

[17] *Id.* at 246.

[18] *Id.* at 224.

[19] 395 F.Supp. at 338.

drastic in its effect. Certainly the withholding of millions of dollars from financially plagued megapolitan cities is a device designed to bring them quickly to their knees. It is because of the stringency of this remedy that I regret the majority opinion of this court did not come down hard on the proposition that such withholding while a potential remedy is a last resort one by holding that in this case the last resort stage had not been by any means reached. A trial judge confronted with the problems of the type here involved should not be permitted to yield to the song of the siren.

In addressing the issue of whether the withholding injunction should be vacated,[20] the district court, after reciting the background, dealt with and denied various legal arguments advanced by the City. Irrespective of whether I am able to agree with the district court's disposition of these, I shall not lengthen this dissent by treating them because my principal concern is with what I regard to be the larger issue of the misuse of equitable power. The district court disposed of the equitable discretion issue in seven paragraphs[21] with principal reliance being placed upon the City's unilateral suspension of the hiring which was to have taken place under the December 16 agreed order. The court found inescapable the conclusion that the City cancelled the interim hiring program, found by the court to involve $350,000 for the first quarter of 1975, in an attempt to lever loose $19,000,000 in revenue sharing funds. Indubitably the City did abandon further hiring despite its needs for replacement patrol officers; however, the court's reasoning ignores the facts that the sum of $350,000 was just the first quarter cost estimate and would be a continuing cost item in the future. At this point because of the inaction of the court, the prospect of a change in the receipt of revenue sharing funds was a bleak one. Further, while $350,000 may have appeared on the petty side to the court when compared with $19,000,000, the City was now facing the fact that without the larger sum it would still have to meet the

[20] 395 F.Supp. at 339 *et seq.*

[21] *Id.* at 344-45.

budgeted payroll of the existing police force. A third of a million dollars it would reasonably seem would constitute the aphoristic straw.

The district court also in considering the equitable discretion issue referred to the fact that the promised new patrol officer examination had not been forthcoming. Over and above the fact that the incentive to forge ahead with the development of this plan had been seriously diluted when it was becoming evident that the City was going to have difficulty in securing a substantial portion of the sum needed to pay the patrol officers already on the payroll, the fact appears obvious to me from an examination of the massive record in this cause that the matter of an a priori determination that a plan for the hiring of police officers would achieve those best qualified to serve in that capacity is an extremely difficult task. A federal district judge who is faced with the awesome task of saying that methods of selection are truly job-related or not job-related is deserving of great sympathy. Certainly Judge Marshall in the instant case can be said to have given every ounce of devoted attention to the best possible resolution of the thorny questions involved. Nevertheless, from the point of view of the devisers of the plan who had to produce methods which at once would achieve job-relatedness and would not be violative of Title VII, the problems were also awesome. From my own observation of this record, I could entertain real doubts as to whether the matter of an equation between performance on examinations and performance in the field would be susceptible of advance determination but would necessarily be dependent upon an examination of the actual performance. Even this post hoc approach would not seem productive of scientific certitude as at least some of the evaluation of actual performance would be based upon human subjective considerations.

The majority opinion of this court obviously does not agree with my evaluation of the stringency of the withholding remedy and states that the direct interference with activities of local government is more drastic than the withholding of federal funds. While the district court here engaged in both the direct and indirect forms of interference, I cannot agree with the majority premise that the withholding lacks stringency

of the greatest magnitude. Stopping the flow of lifeblood to a body is certainly more fatal than enjoining that body from certain activity. In the context of the states' power to tax, a great Chief Justice long ago observed that the power to tax involves the power to destroy.[22] It appears to me that the power to withhold operational funds from a municipality has an equally destructive potential. As the district court itself observed, the philosophy of the Fiscal Assistance to State and Local Government Act, 31 U.S.C. § 1221, "is to return to state and local government a portion of the individual federal income taxes *paid by the inhabitants of the territory governed by the state and local government.*" (Emphasis added.)[23] Implicit in the recognition that upon ultimate analysis the City was just getting its inhabitants' tax money back for its own uses was the court's further observation that "[t]he funds are payable to the state and local governments almost as a matter of right on a quarterly basis."[24]

Illumination upon the stringency of the withholding of federal funds is found in an analogous situation in the remarks of Senator Hubert Humphrey, the Senate Manager of the 1964 Civil Rights Act:

> The objective of title VI is, and should be, to end discrimination, and not to cut off Federal funds. In its present form, title VI is drafted on the theory that cutoff of funds should be avoided if racial discrimination can be ended by other means. It encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education, public health, social welfare, disaster relief, and other urgent programs. Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination. Title VI would require that funds be refused or terminated if other methods of ending discrimination are not available, or have not proved effective. But it would allow Federal departments and agencies to try such other methods first.

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[22] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 210 (1819).

[23] 411 F.Supp. at 244.

[24] *Id.*

> Mandatory, immediate cutoffs of Federal funds would defeat important objectives of Federal legislation, without commensurate gains in eliminating racial discrimination or segregation. [110 Cong. Rec., p. 6546.]
>
> Termination of assistance, however, is not the objective of the title—I underscore this point—it is the last resort, to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds. This fact deserves the greatest possible emphasis: Cutoff of Federal funds is seen as a last resort, when all voluntary means have failed. [*Id.* at 6544.]

This attitude toward the stringency of the remedy was also reflected in the present litigation by the response of the federal defendants to plaintiffs' renewed motion for summary judgment:

> The withholding of revenue sharing payments to a recipient govenment can have the result of *initiated* programs being terminated, taxes being increased, employees being laid off, services being denied and other adverse effects. The fact that these funds will eventually be released some time in the future certainly does not mitigate the present fiscal plight which they would be experiencing. . . .

It is also of some significance that in the district court the position of the City in seeking vacation or modification of the withholding order was supported by *amici curiae* briefs filed by the following responsible civic organizations: the Chicago Bar Association, the Chicago Crime Commission, the Civic Federation, and the Southeast Chicago Commission. These organizations which recorded their long standing stance against sexual and racial discrimination asserted that the economic sanction of revenue sharing termination was inappropriate in the circumstances of this case. The district court apparently found little significance in their support of the City because of their lack of familiarity with the record of this case.[25] Nevertheless,

[25] 411 F.Supp. at 228-29.

at the very least their support is indicative of the stringency of the economic weapon then being used by the court.

The majority opinion finds a preference for withholding funds as an enforcement means on federalism grounds. The stringency of the remedy, however, appears to me to be inconsistent with the trend of recent controlling decisions in the federalism area. See the discussion in § 52A, "Our Federalism," of Professor Charles Alan Wright's Law of Federal Courts, 3rd ed., 1976 at 229 *et seq.*, tracing the developments initiated by *Younger v. Harris*, 401 U.S. 37 (1971), through *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). We also should not be unmindful that the Congress at one time provided for procedures, now happily substantially eliminated from federal jurisprudence, whereby interference with fundamental state procedures required the convening of a three-judge district court because of the likelihood of public resentment at such action occurring as the result of the action of a single judge. *See* Wright, *supra* at 213.

While I would entertain serious doubts about the power of the district court at the pertinent time to enjoin the payment of the federal funds in the absence of a showing that there had been noncompliance with an injunction against discriminatory action, a situation which was certainly true at the time Judge Smith entered the original withholding injunction, in the light of cases such as *Adams* and *Lee*, cited in note 40 of the majority opinion, I have, as previously indicated, not thought it necessary to pursue this aspect of the case in view of what I regard as the serious misuse of the power to the extent to which it may have existed.[26]

Unfortunately in the realm of human relations and the solution of problems arising therefrom there is no such thing as instant replay. The crystallization of attitudes

[26] Further, the situation as to the existence of the power in the future may have changed in view of the State and Local Fiscal Assistance Amendments of 1976. I would, however, not be able to agree with the plaintiffs' contention that the amendments are merely additional authority as to the existence all along of the power.

and aggravations, real or believed to be real, all too often nullify the possibility of retracing steps toward an amicable and desirable solution. Here I am convinced that the withholding of needed revenue funds came about not because of any necessity but through a set of unfortunate circumstances which improperly delayed the result which the district court was so assiduously seeking.

As a culmination of the developments which have been set forth—the antagonisms, the cross-purposes, and, indeed, the loss of perspective—inevitably the order of February 2, 1976, under review here, perpetuated this unfortunate comedy of errors. I would therefore reverse the order enjoining the payment of the revenue sharing funds and order all such funds not heretofore released paid forthwith to the City.

As previously indicated in this dissent, I am in general agreement with the result reached otherwise in the majority opinion. I nevertheless find it necessary to remark upon certain phases of the issues presented to this court in the present appeal.

1. *Mandatory Quotas.* Despite the fact that several courts have found resort to the imposition of mandatory quotas to be the only practicable solution to the problems presented by either racial or sexual discrimination, it appears to me that this resort should only occur when the circumstances ar of an *in extremis* nature. I regard this to be particularly true when the matter is the composition of a police department. In today's climate of increasing crime, with accompanying increase of public indignation and fear, the only standard for police department composition at every echelon should be, in my opinion, the very best possible person obtainable for the work to be performed. meeting this standard means that the makeup of the department is disproportionately high with minority groups in relation to their position in the population picture, this would be more desirable than their being limited by the artificial limitation which is implicit when a quota has been imposed. It is for that reason no doubt that minority groups themselves do not consistently favor a quota system. It would appear fortunate that

in later proceedings in the district court in the present litigation, which proceedings are not now before this court for review, the district court is amenable to deviating from strict adherence to the quota system in accordance with its own expressed distaste for that system.

2. *The Isakson Defendants.* The majority opinion at one point in relation to these defendants indicates that the 42 percent of the patrol officers "must be selected from the applicable eligibility rosters, in rank order." Insofar as this is stating, which it appears to be doing, that the 42 percent should have been hired from the 1971 patrolman's roster, it would seem to me to be inconsistent with the result thereafter reached in the opinion that it would be inappropriate for this court to decide the difficult questions of state law that might arise in determining the rights of persons on the 1971 roster in the light of the existence of the new 1975 examination roster. I think the court would have been better advised simply to leave the matter of determination of the applicable state law to the district court, which is the ultimate holding on the Isakson issue.

3. *The Background Investigation.* The majority opinion recognizes "that careful screening through investigation of an applicant's background can be a useful device in determining whether an applicant has the personal qualities required of a police officer." I regard it as more than a useful device; rather it appears to me to be an essential instrument for the purpose. As the district court observed. "*Of course*, the Department *must* protect itself from those who would undermine it or work at cross purposes with it." (Emphasis added.)[27] What the district court did not add but is obvious is that the Department must protect itself not for its own self-preservation as an institution but because it is in the public interest that the police duties be performed effectively.

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[27] 385 F.Supp. at 557.

I cannot quarrel with the position of the district court affirmed by this court that there be articulable standards for guidance of those conducting the background investigations. Broadly stated criteria too easily lend themselves to subjective whim. Nevertheless, I am concerned with an implicit suggestion in both the writing of the district court and the majority opinion which might be construed as minimizing the importance of good character on the part of police officers. Perhaps the supervisor of the Recruit Processing Section was unable to put into words what "dissolute habits" meant,[28] but I have little doubt that if one's neighbors thought a person had dissolute habits, he would have little respect from them as a police officer without which respect he could not capably perform his duties. To paraphrase a famous reference in another field of law, the neighbors also might not be able to define in words "bad character, dissolute habits, and immoral character," but most of them would be able to recognize the existence of these attributes in those with whom they are acquainted.

It perhaps is too much to expect that every police officer will be an exact duplicate of Caesar's wife, but the nearer that goal is approached the more effective the police department will be. Frequent arrests or poor regard for financial obligations may be explicable and be shown not to detract from the ability to be an effective police officer. On the other hand, either or both may be demonstrative of an underlying disrespect for the law, a deficiency which should not exist in a person holding this position. It should also be remembered that in the city scene with the overload on the prosecutorial staffs and the courts and the reluctance of witnesses to become involved, many arrests which do not result in convictions nevertheless are arrests of guilty persons. The police department, in my opinion, is a questionable forum for rehabilitation. The job of articulating objective standards in the present area is certainly a tremendously difficult one. I merely express the hope that when the difficult task is completed the reviewing

[28] 385 F.Supp. at 556.

courts will permit the inclusion of aspects therein on a realistic basis consonant with the achievement of as high as possible regard on the part of the public toward those performing the duties of police officers.

4. *The Constitutional Sex Discrimination Issue.* The majority opinion correctly observes that the district court, by equating the equal protection clause with Title VII, failed to deal with the difficult problems which arise when a claim is made that a sex-based classification violates the equal protection clause. It directs the district court to face on remand the question of whether the intent requirement which *Washington* imposed on claims of racial discrimination also applies to claims of sexual discrimination. I think that our directive guidance should also require the district court to face the question in the light of *General Electric Company v. Gilbert*, ... U.S. ....., 45 U.S.L.W. 4031 (December 7, 1976).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B.

POLICE SERGEANT EXAMINATION

Department of Police

Examination No. 7952-P

August 18, 1973

CIVIL SERVICE COMMISSION

William E. Cahill, President

Reginald DuBois

Quentin J. Goodwin

Charles A. Pounian

Personnel Director and Secretary

[City of Chicago, Illinois]

This is your examination for POLICE SERGEANT. Read each question carefully and decide which answer is correct or most nearly correct. Then mark the corresponding space on your separate Answer Sheet.

All questions concern the policies, procedures and activities of the Chicago Police Department. Where reference is made to titles such as patrolman, sergeant, etc., they refer to members of the Chicago Police Department. Where the word "he" is used, it refers to "he" or "she".

1. Investigation and approval of an officer's request for permission to work at a second job are functions of
   a. his unit commander.
   b. his district watch commander.
   c. the Internal Affairs Division.
   d. the Personnel Division.

2. A request for a replacement vehicle from the Reserve Vehicle Pool is made by a

a. a patrolman.

b. sergeant.

c. watch commander.

d. district commander.

3. When a patrolman conducting a preliminary investigation determines that the service of an Evidence Technician is required, he should notify

a. his sergeant.

b. the dispatcher.

c. his watch commander.

d. the Evidence Technician Section.

4. If a civil suit is brought against a sworn officer, he should immediately prepare a to-from report to

a. his watch commander.

b. his district commander.

c. the District of his Division.

d. the Superintendent of Police.

5. Notifying a mental hospital that a patient on unauthorized absence has been apprehended is the responsibility of the

a. arresting officer.

b. desk sergeant.

c. watch commander.

d. Field Inquiry Section personnel.

6. When a defense attorney seeks to interview a police officer in a criminal case, the officer contacts the _____ office for advice.

a. State's Attorney's

b. Attorney General's

c. Corporation Counsel's

d. Departmental Advocate's

7. An officer found guilty of unsafe driving practices by the Traffic Safety Review Board for the second time within a 12-month period may be subject to

a. oral or written reprimand.

b. forfeiture of three regular days off.

c. suspension for an indefinite period.

d. separation from the Department.

8. You, as a newly appointed sergeant, are reviewing the case reports of your subordinates. You find a number of misspelled words in their narratives and call the errors to their attention, asking that the errors be corrected. When the men respond that the sergeant they worked under before never cared about misspelled words as long as the narrative was accurate, you should tell them that

a. they work under your supervision now and that this is the way you want them to do it.

b. you see their point but that the department has good reasons for requiring that this be done.

c. this is the way reports must be completed but that you agree that spelling is not as important as accuracy.

d. the general orders specify that words be properly spelled and that narratives be grammatically correct.

9. The arrest of any person suspected of being a subversive or a member of a syndicated crime organization should be reported immediately by the arresting or investigating officer to the

a. watch commander.

b. district commander.

c. Intelligence Division.

d. Vice Control Division.

10. The primary responsibility of every supervisor is to

a. facilitate good working relationships.

b. see that work is performed properly and on time.

c. train subordinates in new methods and procedures.

d. maintain the health and physical welfare of his men.

11. One of the beat cars on your watch has been consistently slow in answering calls in its assigned area. You, as sergeant, have talked to the men but have seen no improvement. Your best approach would be to

a. issue summary punishment.

b. ride with the patrolmen yourself.

c. respond to all calls within that beat.

d. re-assign one of the patrolmen to a different beat.

12. Which of the following is *Not* a specific duty of a field sergeant?

a. Ensuring that subordinates engage fully in traffc law enforcement.

b. Reviewing and examining reports submitted by subordinates to determine accuracy.

c. Reviewing citations issued by subordinates and initialing to indicate completeness.

d. Ensuring that subordinates do not engage in practices which interfere with police services.

13. A patrolman, who is not the beat officer assigned, kills an offender who is fleeing from the scene of a burglary. Who is responsible for completing the Crimes Against Person Case Report?

a. An investigator.

b. The officer who killed the offender.

c. The beat officer assigned to the burglary.

d. None of the above.

14. Under Plan Blue of the Emergency Response Plans,

a. selected units supply personnel who are on duty when the period of the emergency begins.

b. selected off-duty sworn personnel report immediately to a unit of assignment, however they are dressed.

c. all off-duty sworn personnel report immediately to a predesignated unit of assignment in a specified uniform.

d. all on-duty sworn personnel report immediately in uniform with helmet to their district of residence assembly area.

15. Heavy weapons are employed in Civil Disturbances only with the approval of the

a. field lieutenant.

b. watch commander.

c. Assistant Deputy Superintendent.

d. Deputy Superintendent.

16. A citizen pulls up to a building on East Washington Street during the rush hour. He has two young children in the car and he has come to pick up his wife at the doctor's office. He double parks in a No Parking zone. A patrolman notices his actions and tells him to move on. The man, pointing to the other cars parked illegally, asks the patrolman "Why should I, when all those other cars are there?" The patrolman tells the man he is in the process of writing tickets for the other cars. The man becomes angry. His children start crying. The patrolman becomes angry and calls his sergeant. The sergeant should

a. tell the patrolman to continue writing his tickets and tell the citizen he should drive around the block.

b. have the patrolman give the citizen a ticket an tell the patrolman if he has any more trouble to call him.

c. have the patrolman continue to ticket all illegally parked cars and explain that the policeman is only doing his job.

d. tell the patrolman to continue writing his parking tickets and threaten the citizen with arrest for disorderly conduct.

17. When a supervisor finds it necessary to organize a quadrant search, officers assigned will *Not*

a. notify the dispatcher when leaving their vehicle to search on foot.

b. notify the dispatcher when any subsequent pertinent information is obtained.

c. from the appropriate point work inwardly, search the quadrant thoroughly, and stop and question suspicious persons.

d. respond immediately to a specified quadrant but approach no nearer the crime scene than the offender might cover on foot, or by car.

18. What information may *NOT* be provided to authorized news media representatives?

a. Case reports.

b. Arrest reports.

c. Names of suspects.

d. Teletype messages.

19. Officer Beam visits a tavern on his night off. He gets into a fight with another patron, Mr. Stander, and breaks Mr. Stander's jaw. While on duty the following day, still irritated by the events of the night before, Officer Beam uses excessive force in arresting Mr. Toast. Mr. Toast, who did not provoke Officer Beam in any manner, also sustains a broken jaw. Under the Federal Civil Rights Act in relation to civil liability of the police, ... may seek redress under the Federal Civil Rights Act.

a. the tavern.

b. Mr. Toast only.

c. Mr. Stander only

d. both Mr. Toast and Mr. Stander.

20. The image of a professional police officer is best determined by the

a. authority projected by his personality.

b. authority inherent in his gun and uniform.

c. ability to become accepted as a part of the community.

d. ability to approach different people in different ways

21. Below is a list of a actions an officer can take when involved in a crowd control situation involving peaceful assembly.

1. Maintain a businesslike appearance.

2. Try to be as personable and likeable as possible.

Which of these is/are appropriate action(s)?

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1 only.

b. 2 only.

c. Both 1 and 2.

d. Neither 1 nor 2.

The Robbery Case Report on the following page has been completed by the patrolman of beat 3216. It has been submitted to the sergeant for review and approval. You are to assume that you are the sergeant reviewing the report and answer the questions that follow it.

22. Which one of the following boxes contains information inconsistent with information elsewhere in the report?

a. Box 1.

b. Box 11.

c. Box 32.

d. None of the above—all are correct.

23. Which one of the following boxes contains information inconsistent with information elsewhere in the report?

a. Box 2.

b. Box 19.

c. Box 33.

d. None of the above—all are correct.

24. Which one of the following boxes contains informaton inconsistent with information elsewhere in the report?

a. Box 7.

b. Box 15.

c. Box 24.

d. None of the above—all are correct.

25. Which one of the following boxes contains information inconsistent with information elsewhere in the report?

a. Box 10.

b. Box 18.

c. Box 35.

d. None of the above—all are correct.

26. Which one of the following boxes contains information inconsistent with information elsewhere in the report?

a. Box 8.

b. Box 16.

c. Box 25.

d. None of the above—all are correct.

27. Which one of the following boxes contains information inconsistent with information elsewhere in the report?

a. Box 9.

b. Box 17.

c. Box 28.

d. None of the above—all are correct.

28. Tear gas can be employed in Civil Disturbance incidents only on the approval of a/an

a. officer of exempt rank.

b. supervising sergeant.

c. Deputy Superintendent.

d. Commander of the Special Operations Group.

29. Under Plan Purple, off-duty sworn personnel report to

a. their district of assignment.

b. headquarters at 11th and State.

c. their district of residence assembly area.

d. none of the above.

30. An Immediate Emergency Plan may be invoked by

a. any police officer.

b. any sergeant.

c. the beat sergeant where the incident occurred.

d. the field lieutenant where the incident occurred.

31. When assigned to a Civil Disturbance incident, which of the following is/are true?

1. Firing over the heads of crowds is specifically forbidden except on specific order of a member of the Department with the rank of captain or above.
2. Firing into crowds is specifically forbidden except on specific order of either a member of the Department with the rank of First Deputy Superintendent or other command personnel specifically designated by the First Deputy Superintendent.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1 only.

b. 2 only.

c. Both 1 and 2.

d. Neither 1 nor 2.

32. Following an arrest for suspected Driving While Under the Influence, a breath test must be completed within

a. one hour.

b. one and one-half hours.

c. two hours.

d. two and one-half hours.

33. One of your assignments as a beat sergeant is to investigate a complaint that a woman is selling homemade candy to school children. You find that the woman sells the candy on her front porch to the school children as they go home in the afternoon. She explains that since she is on her own property, she is doing nothing wrong. Which one of the following is the appropriate action to take?

a. Issue a warning and submit a report on your investigation.

b. Confiscate the candy and tell her not to sell any more candy.

c. Arrest her for selling the candy and take the candy as evidence.

d. Issue her a non-traffic summons and explain about court procedures.

34. A patrolman is sent to the scene of a fight. It is 1500 hours on a hot July afternoon, and when he arrives at the scene he finds a large crowd (100-150) people) milling about. He makes his way through the crowd to the victim, ascertains that the victim is dead and asks what has happened. He is told by some of the victim's friends that there was a knife-fight, and that the offender was seen entering an apartment building down the block. After radioing for assistance, his next action should be to

a. begin to disperse the crowd.

b. begin pursuit of the offender.

c. check the victim for identification.

d. interview witnesses at the crime scene.

35. You are the desk sergeant for the second watch. Several youths enter and inquire about a friend who has just been arrested for drinking in the park. Which one of the following is the appropriate action for you to take?

a. Tell them to come back later because their friend has not been processed yet.

b. Tell them you can only give information about a prisoner to his family or his lawyer.

c. Question them to find out if they had any part in the incident or any information that could be used in court.

d. Tell them you have no information on their friend's situation, but explain arrest and bond procedures to them.

36. The Neighborhood Relations Division has the primary responsibility of

a. disseminating information to neighborhood organizations, public and private agencies, and Department personnel.

b. coordinating the Police Department's human relations programs and establishing student programs in schools.

c. providing a means for police-citizen communications, directed toward developing an understanding and application of crime prevention measures.

d. all of the above.

37. A sergeant and two beat cars respond to a call of a potential riot. There are approximately 300 people gathered in the area and obvious tension is developing. In what sequence should the following events take place?

1. Inform the field lieutenant and/or watch commander.

2. Call in additional personnel.

3. Arrest the suspected leaders.
4. Request that the crowd disperse.

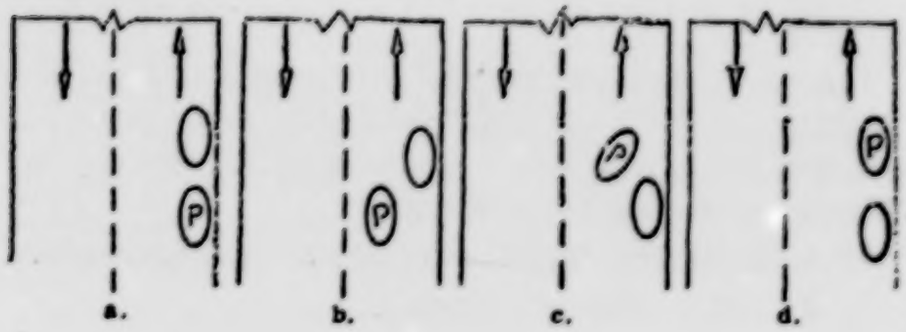
Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1, 2, 3, 4
b. 2, 1, 4, 3
c. 2, 4, 1, 3
d. 4, 1, 2, 3

38. There is a disturbance reported at the local high school. When you arrive you find a crowd of 100-150 students watching a fight involving two girls from rival gangs in the lunchroom. After breaking up the fight you find that one girl's face has been badly scratched. After calling for additional police support, you should

a. begin to interrogate those involved to discover what happened.
b. begin to disperse the crowd, using teacher personnel for assistance.
c. take all parties involved to the principal's office for interrogation and medical attention.
d. get the names and addresses of the girls involved, send the unharmed girl home and take the injured girl to the hospital.

39. When stopping an automobile ( ) on a 4-lane street, the squad car (P) should be positioned in which of the following ways?



40. A patrolman has called in a report that there has been another theft from a truck parked in the lot of a certain diner. Three weeks ago a truck which had been parked in this same lot had had sheet metal stolen from the truck while the driver ate dinner. This truck driver, who works for the same company, said that he had been in the diner for about 45 minutes. When he returned to his truck, his load of copper tubing was gone. What are the first three (3) steps for the assigned investigator to take?

1. Locate and interview known fences.
2. Interrogate the owner of the diner.
3. Interrogate the truck driver.
4. Contact the company which insures the truck line.
5. Review the previous case report.
6. Interrogate the owner of the truck line.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1, 2, 3
b. 2, 3, 5
c. 3, 5, 6
d. 3, 4, 5

41. A citizen registered a complaint about the liquor license of a Bar and Grill. The dispatcher assigned a beat car to the Bar and Grill. The patrolmen are required to send for a

a. patrol sergeant.
b. field lieutenant.
c. watch commander.
d. district commander.

42. While one of the following statements is *FALSE* regarding the proper conduct of searching a building? (Assume the general location of the suspect is unknown.)

a. Place guards outside the building.

b. Start at the basement and progress to the roof.

c. Search as many floors at one time as is possible.

d. Guard stairways and other exists while conducting the search.

43. As a Criminal Investigation Division sergeant you have been directly involved in the investigation of a homicide. You have been informed that you are going to be called to testify in connection with a gun that you found at the scene when the gun is introduced in evidence at the trial. The most important factors to be considered when you testify are the

1. procedures for maintaining a secure chain of custody.
2. results of ballistics tests.
3. relevancy of the evidence to the crime.
4. proper identification of the evidence.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1, 2, 3

b. 1, 2, 4

c. 1, 3, 4

d. 2, 3, 4

44. What is the first step in protecting a crime scene?

a. Restrict the area, by rope if necessary.

b. Call for additional patrolmen to guard the scene.

c. Remove all persons from the scene immediately and place them at a safe distance from the scene.

d. Keep all persons at the scene exactly where they were, and protect all physical evidence from being moved.

45. The type of search used with extremely dangerous or violent persons is the ..... search.

a. wall

b. prone

c. kneeling

d. standing

46. In connection with line-up procedures, which one of the following statements is *FALSE*?

a. Accused may have counsel present at line-up.

b. Accused may be placed in line-up prior to being charged.

c. Circumstances may justify a one-on-one confrontation instead of a line-up.

d. None of the above.

47. Which one of the following is *NOT* a suggested procedure when arriving at a building to be searched?

a. All patrol car personnel notify the Communications Center as to which entrance or exit they will cover.

b. Police officers assigned to the outside of the building should stop and talk to citizens for possible information.

c. When all exists and entrances are secured, the searching officers will all enter the building at the same location.

d. The highest ranking officer will be in charge. If no sergeant or above is present, the officer assigned to that beat will be in charge.

48. Before an object can become evidence, it must be recognized as having significance with relation to the offense. Development of which of the following will contribute to an officer's ability to conduct successful investigations?

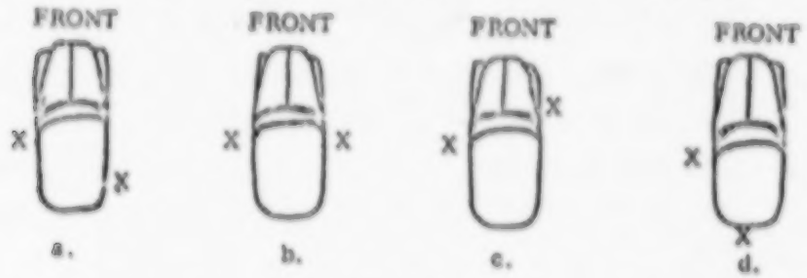
1. Knowledge of the law of evidence and its application in court procedure.
2. Ability to re-create imaginatively the events preceding, during, and after the commission of a crime.
3. Ability to recognize indications of a modus operandi.

4. Knowledge of the substantive law relating to the offense under investigation.
5. Knowledge of scientific laboratory techniques and the conclusions which may be derived from their use.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1, 2, 3, 4
b. 1, 2, 3, 5
c. 1, 3, 4, 5
d. all of the above

49. When two patrolmen make a rear approach to a standing automobile with several occupants, the proper approach would include taking which one of the following positions?



50. A patrolman is assigned to a one-man car and receives a 'prowler' assignment. What is the first thing he should do upon arrival at the scene?

a. Make a cursory search.
b. Interview the complainant.
c. Wait for the arrival of an assist car.
d. Begin a thorough search of the premises.

51. Of the points to remember when testifying in court, which one of the following is *INCORRECT?*

a. Explain completely the incident about which you are asked.
b. When answering, limit the information to what has been asked.

c. It is proper to use slang or police terms to give your testimony.
d. Answer the questions accurately though you may lose the case by doing so.

52. Police officers have an obligation when making an arrest to do all but which one of the following?

a. Permit the arrestee to communicate with his attorney.
b. Permit the arrestee to communicate with any member of his family.
c. Advise the arrestee of his rights if he is being interrogated.
d. Advise the arrestee of his duty and responsibility to give all evidence.

53. A department store security guard observes an individual in the store with store items that have not been paid for proceeding toward an exit. He detains the man and calls the police. A patrolman arrives, but declines to arrest the man on the premises. The security guard insists that the man be arrested. The patrolman calls his sergeant. As his sergeant, you should advise the patrolman to

a. make the arrest.
b. take the offender off the premises and arrest him.
c. take the security guard and the offender to the station.
d. make no arrest.

54. While on patrol you observe a woman struggling with a man for her purse. The man wrenches the purse from the woman, knocking her down in the process, and runs. You apprehend the man and charge him with

a. robbery.
b. purse-snatching.
c. strong-arm robbery.
d. battery and robbery.

55. An officer has the right of search and seizure during a lawful arrest except for the purpose of

a. preventing the prisoner from escaping.

b. protecting the arresting officer from attack.

c. discovering evidence for other possible crimes.

d. discovering the means used for committing the crime.

56. Which one of the following cases presents grounds for arresting Mr. Johnson without a warrant?

a. A salesman in a department store tells an officer that Johnson has been in his section of the store for about an hour. He has not bought anything and is wandering around very suspiciously. The officer asks Mr. Johnson what he is doing. Mr. Johnson seems to be unable to explain.

b. Mr. Simon is known to be a narcotics peddler. When the officer sees him standing on a dark corner he is speaking with Mr. Johnson.

c. Mr. Johnson is walking down a residential street at 0600 hours. The officer questions his purpose and Mr. Johnson refuses to explain.

d. None of the above.

57. Immediately upon arrest, the individual is entitled to all but which one of the following?

a. Right of bail.

b. Right of preliminary hearing.

c. Right of Habeas Corpus.

d. Right to counsel.

58. Persons subject to State of Illinois curfew laws are

a. males and females under 16.

b. males under 16, females under 17.

c. males under 17, females under 18.

d. males and females under 18.

59. You observe a man put his hand into a woman's purse. Ideally, an arrest should be made.

a. when his hand is in the purse.

b. when he removes material from the purse.

c. as he conceals the material on his person.

d. as he leaves the scene.

60. A beat sergeant patrolling his area receives a call that there is a "body in the water." Upon arriving at the scene he learns that his two patrolmen assigned to the park were the first to respond. The Fire Department motor rescue team is already searching for the body. The sergeant should

a. call the field lieutenant to the scene.

b. make out a report and return to the station.

c. instruct the patrolmen to remain on the scene.

d. remain on the scene until the body is recovered.

61. Officer Able attempts to arrest a mental patient who has inflicted great bodily harm on several other persons. The individual attempts to run from the officer. Which one of the following statements is true with reference to the use of deadly force during this arrest?

a. The injuries inflicted are justifiable reasons by themselves.

b. The officer must know whether the patient is reasonably guilty of a felony.

c. The officer must be reasonably certain that the patient may endanger more human life.

d. A mental patient cannot be arrested by deadly force unless the officer's life is endangered.

62. Sergeant Brown has obtained an arrest warrant for Mr. James Bradford. Sergeant Brown must

a. circulate the warrant in the field until the arrest of Mr. Bradford has been made.

b. secure Mr. Bradford's arrest within a week's time or have the warrant re-issued.

c. arrest Mr. Bradford within 24 hours or take the warrant to the Central Warrant unit.

d. immediately register the warrant with the watch commander of the Central Warrant unit.

63. In transporting arrestees in a plexiglass-equipped car, which one of the following is *NOT* true?

a. An unconscious arrestee may not be transported.

b. An arrest report is received from the arresting officer.

c. No more than four arrestees shall be transported at one time.

d. The arresting officer accompanies the vehicle to the detention facility.

64. A patrolman under your supervision observes a man running from a gangway. Upon reaching the gangway he finds a woman, her clothing disarranged and torn, lying on the ground. She screams that she has just been raped, that the offender has just run out of the grangway. The patrolman pursues the offender, shouts halt, and when the offender does not do so, the patrolman draws his service revolver and fires. The officer had probable cause to shoot because the offender

1. was accused of a forcible felony.

2. ignored the officer's order to stop.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1 only.

b. 2 only.

c. Both 1 and 2.

d. Neither 1 nor 2.

65. If you arrest an adult for glue-sniffing, you must notify the

a. Youth Division.

b. Vice Control Division.

c. Criminal Investigation Division.

d. none of the above.

66. Police dogs can be called to the scene, where a crime has been committed, by the

a. beat officer.

b. beat officer with the approval of a beat sergeant.

c. beat sergeant with the approval of a field lieutenant.

d. field lieutenant with the approval of a Deputy Superintendent.

67. A man is arrested and brought into the station. The man is identified as a runaway patient from a mental hospital. The arresting officer should

a. immediately have the man transported to the mental hospital.

b. have the man taken to the lock-up in the station and processed.

c. inform the watch commander of the situation and have the man removed to the Central Detention lock-up.

d. include on his arrest report "Patient on unauthorized absence from the Illinois Department of Mental Health. Do not release on bond."

68. Mr. Harliss, an arrestee charged with a felony, becomes violent and irrational. Mr. Harliss should be

a. transported to Cermak Memorial Hospital.

b. handcuffed and kept in the station's lock-up.

c. transported to the Read Mental Health Center.

d. handcuffed and taken to the Central Police lock-up.

69. Which one of the following is *NOT* part of the proper procedure in answering a 'suspicious man' call?

a. Turn the radio off.

b. Avoid use of the siren.

c. Turn off the ignition and remove keys.

d. Be alert for persons leaving the scene.

70. Which one of the following first aid procedures would be most important before attempting to transport any person with multiple injuries?

a. Stop severe bleeding.

b. Immobilize fractures.

c. Begin resuscitative measures.

d. Begin shock prevention measures.

71. A woman living on the edge of the city phones in a youth disturbance which has resulted in the breaking of her front window. Upon arrival, the officers see that the suspect youths have moved from the caller's lawn across the street into the adjoining suburb. The officers should

a. pursue and arrest the suspects.

b. refer the call to the suburban police.

c. apprehend the youths and hold them in custody until the suburban police arrive.

d. take a statement from the caller, but tell her there is nothing they can do because the youth are outside the city limits.

72. Which one of the following incidents does *NOT* require a case report?

a. Purse snatching.

b. Public indecency.

c. Attempted suicide.

d. Disorderly conduct.

Read the following situation, and answer the questions that follow.

An accident occurs on the expressway involving a semi-trailer truck and several autos. Several people have been injured, 1 seriously. It is shortly before the rush hour, and the debris and wreckage, which blocks 2 of the lanes, will not be cleared in time to accommodate the expected increase in traffic. A traffic car is first on the scene. He calls for a squadrol, which arrives shortly thereafter, followed by two 1-man patrol cars, another traffic car, the traffic sergeant, the patrol sergeant, a field lieutenant (patrol), and other supervisory personnel.

73. The _____ would most likely be responsible for aiding the injured and expediting the traffic flow at the accident scene.

a. traffic sergeant

b. patrol sergeant

c. traffic officer first on scene

d. squadrol patrolmen

74. Assuming that the following men are present, the _____ most likely make the decision to reroute rush-hour traffic off the expressway.

a. traffic sergeant

b. patrol sergeant

c. field lieutenant

d. traffic watch commander

75. Of the following, the _____ would have responsibility for deciding what local streets would be used in rerouting traffic off the expressway.

a. traffic sergeant

b. patrol sergeant

c. field lieutenant

d. beat officer involved

76. Of those on the scene, the _____ will have ultimate responsibility for the proper conduct of activities at the scene, once the immediate situation is resolved.

a. traffic sergeant
b. patrol sergeant
c. field lieutenant
d. traffic officer

77. You, a sergeant, respond to a call for assistance from one of your beatmen who has answered a disturbance call at a restaurant. When you arrive, the patrolman tells you the following: The restaurant is owned by a Mrs. Grundy. Mrs. Grundy's son had beaten up the son of Mr. Green. Then, Mr. Green came into the restaurant and shot it up with a hand-gun. He was arrested at that time and released on bail. He has now returned to the restaurant and told Mrs. Grundy that he's going home to get a shotgun and will return to the restaurant and kill her. The sergeant should first

a. call in a tactical unit.
b. go to the home of the man and investigate the allegation.
c. tell the woman there's nothing that can be done until the man comes back.
d. put that beat car down and tell the patrolman to maintain a surveillance of the restaurant.

78. You respond to a call that there is a man with a gun in one of the neighborhood bars. You arrive simultaneously with another (2-man) squad car. Upon entering the bar you recognize the armed man as one whom you have arrested before. He also recognizes you. There are civilians present in the bar. You should first

a. clear the bar of civilians.
b. distract the man and rush for the gun yourself.

c. order the patrolmen to rush the man from behind.
d. start to converse with the man to try to relax him.

79. While patrolling a street on your beat, you notice an argument between two male adults. The men are shouting at each other, and you observe one punch thrown. You should first

a. immediately arrest both men.
b. call for more police assistance.
c. find the reason causing the argument.
d. place both men in the back of the car.

80. While driving around checking the patrolmen on their beats, you hear gun shots which appear to be coming from a tavern on the corner. You see a young man running out of the tavern. After immediately calling for assistance, you

a. chase the man who ran out of the tavern.
b. remain in your car until assistance arrives.
c. go into the tavern to investigate the circumstances.
d. call into the tavern and tell anyone with weapons to drop them.

81. A man approaches you on the street carrying a large unmarked carton. The man states that he found the carton in the alley and that there is a rifle inside. You should

a. send the man to the station to turn in the rifle.
b. open the carton on the street to examine the contents.
c. take the carton to the station and note the man's identification.
d. call out an evidence technician to confiscate the rifle and to fingerprint the man.

82. A sergeant receives a call that there is an abandoned vehicle parked in the alley. He responds to the call and notices that the battery, radiator, and other parts are missing. A path

of fluid leads from the car to an apartment. The sergeant should first

a. search the car for evidence.

b. call for more police personnel.

c. search the apartment for suspects.

d. check to see if the car is on the hot sheet.

83. As a patrol sergeant you are receiving a case report concerning the theft of $150. Witnesses' statements are contradictory and the victim's account is not clear. You request the reporting officer to re-examine the case. He now concludes that the complaint was the result of an honest mistake and, in fact, no crime has been committed. The final determination to classify the case as unfounded may be made by the

a. reporting officer.

b. Criminal Investigation Division personnel.

c. reporting officer's immediate supervisor.

d. all of the above.

84. As patrol sergeant you are called to the scene of a traffic accident to assist one of your new patrolmen. The only witnesses are the passengers in the cars involved. Although their descriptions of the cause of the accident are contradictory, the officer is convinced that he knows which driver is at fault. He wants to know what action he should take. You advise him to

a. ticket the driver he has determined is at fault.

b. ticket both drivers to ensure that he is covered.

c. issue no tickets and let the Court decide responsibility.

d. refer the case to the Traffic Division for determination.

85. You and several of your patrolmen are detailed to the Civic Center Plaza where a small demonstration is being held. Most of the group is well-behaved but two of the young men become obnoxious. They have been verbally abusive to several

of the policemen and have personally insulted you twice. One of these young men suddenly jumps into the street urging the crowd to follow him and directing them to lie down in the street in order to block traffic. In this situation, the first action to take is to

a. place the man under arrest.

b. order him to get out of the street.

c. call your lieutenant to ask for advice or assistance.

d. tell the leader of the group that those in the street are his responsibility.

86. As a patrol sergeant you are in an apartment investigating a domestic disturbance. You are accompanied by a recruit you are breaking in. After five minutes of talking with the man and his wife, you feel the situation is under control and no further action is necessary. At this point the recruit enters the conversation, threatens the man with jail if there is a recurrence of the situation and, without provocation, begins using abusive language against the man and his wife. A heated argument begins to develop. You decide to

a. take the recruit aside and tell him to let you handle the matter.

b. interrupt to explain and try to get the situation under control again.

c. tell the recruit his behavior is uncalled for and ask him to apologize.

d. let the recruit continue and see how he will ultimately resolve the situation.

87. A 13-year-old boy who has a satisfactory school record and who has never been in trouble with the Police has just been arrested with three other boys, ages 13, 14, and 16, for the burglary of a dry cleaners. He admits that he acted as lookout in the burglary. As youth sergeant, you decide to refer the youth to

1. the Juvenile Court.

2. a social service agency.
3. a Probation Officer.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1 only.
b. 2 only.
c. 3 only.
d. Either 1 or 2.

88. It is 0300. You are checking on the patrolmen under your supervision. As you drive by a large housing project, there is an apparent gunshot and something hits the fender of your car. You look around and see that everything is very quiet with only a few scattered lights on through the building. You decide to

a. wait in your car to see if anything further develops.
b. call for additional men in order to go in and investigate.
c. leave the immediate area and make an investigation of your fender.
d. go into the building from which the apparent gunshot came in order to investigate.

89. It is late at night and a patrolman under your supervision is patrolling his beat. He drives into an alley where he finds a dead person lying in a pool of blood. There is no one else around. His most important duty is to

a. guard the scene of the crime.
b. contact the mobile unit technicians.
c. call the Coroner to notify him of the death.
d. try to find the man's wallet to get his identification.

90. While out checking on your men, you observe a 1973 Eldorado with six teenagers in it. The driver appears to be under age. When you signal the car to pull over, the driver

speeds up. You radio in a description of the car, your location, and the direction the car is headed. After being pursued for three blocks, the driver runs a light and pulls into the opposite lane to get around traffic. At this point you should

a. continue the pursuit using your Mars light and siren.
b. decrease speed and turn off your Mars light and siren.
c. continue the pursuit with your Mars light and siren off.
d. break off direct pursuit and notify the dispatcher of the situation.

91. A sergeant while on patrol is stopped by a citizen who tells him she has just been robbed by a man with a gun. The citizen points out the man, who is running away into a playground filled with children. The robber shoots at the sergeant. The sergeant should

a. fire a warning shot in the air.
b. run after the robber, holding fire.
c. call for assistance and then pursue.
d. get witnesses' name and obtain description of the robber.

92. A beat sergeant patroling his area finds a beat car parked and not occupied by any patrolman. The car as yet has not been reported down. The sergeant should

1. sit in his car and wait for the patrolmen to return.
2. contact the dispatcher for information on the car's last assignment.
3. check the nearby business establishments.
4. have the dispatcher radio the beat officers to meet him at a specific location.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1, 2

b. 1, 4
c. 2, 3
d. 2, 4

93. At 0500 hours you respond to a call to investigate a suspected abandoned auto. Upon arrival at the scene, you find a car parked in the alley blocking the entrance to a resident's garage. The resident has called because he will shortly need his own car and wants the other car moved. He tells you that he deos not recognize the car. You check and find that no auto of this description has been reported stolen. You enter the car and find several pieces of mail with a name and address. The address is about a mile from your present location. Your best action would be to

a. report an abandoned auto and request a tow.
b. attempt to notify by phone the person identified on the mail.
c. radio in the name and address found on the mail, and have that beat's car notify the person.
d. investigate to ascertain whether the car does indeed belong to someone in the immediate neighborhood.

94. A classroom is vandalized by an entire class of 30 children all under 16 years of age. The incident was investigated by a patrolman who turned the case over to the youth sergeant assigned to the area. The sergeant's investigation, consisting of speaking to all the juveniles in the class, disclosed that only four children were primarly responsible although all the students were actively involved. The sergeant's action in this situation should be

a. taking into custody all the students in the class.
b. identifying and taking into custody the prime offenders.
c. warning parents of neglecting their parental obligations.
d. lecturing the class on the wrongdoing and letting the matter drop.

95. A sergeant, along with two 2-man beat cars, responds to a burglary-in-progress in a high-rise apartment building. The call did not provide the floor or apartment number. There are 2 (two) stairways and 2 (two) separate elevator systems in the building. The personal radios do not function inside this particular building. The sergeant should take which of the following actions? (Alternatives are given in suggested sequential order.)

1. Start a floor-by-floor search.
2. Assign a man to each separate exit.
3. Call for additional support.
4. Attempt to locate the caller.
5. Radio for additional information.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 2, 3, 5
b. 3, 2, 1, 5, 4
c. 4, 3, 1
d. 5, 4, 3

96. A citizen calls at 1930 hours and states that she has seen someone climbing through her neighbor's kitchen window. You are a patrol sergeant and are first to arrive at the scene. You see lights inside the house and a radio is on. What is your next move?

a. Assume an offender is inside and enter forcibly.
b. Knock and inquire about what the caller has reported.
c. Proceed to the caller's house to get further information.
d. Investigate the kitchen window for possible forced entry.

97. While on patrol, a general description of a felony offender comes over the radio. A patrolman observes someone who fits the descripion in the same area as the crime scene.

He stops and questions the man requesting that the man accompany him to the station to appear in a showup for the victim. The man tells the patrolman that he would like to accompany the officer but that he's late for an appointment. The patrolman calls his sergeant who tells him to

a. arrest the man as a suspect for the crime.
b. take his name and address and let the man go.
c. take the man back to the crime scene for identification by the victim.
d. hold the man at the present location and request that the victim be brought there to identify him.

98. While checking on your men at 0500 hours you observe smoke pouring out the windows on the 10th floor of a hotel. You can see some residents standing at open windows. After turning in a fire alarm, you enter the hotel and find the lobby deserted. The one course of action *NOT* to follow would be

a. take the elevator to the 10th floor to rouse occupants to warn them of impending danger.
b. proceed to the switchboard and begin ringing all rooms on the 10th floor to warn them of impending danger.
c. try to locate the manager or desk clerk to get information for the use of the firefighters when they arrive.
d. position yourself across the street from the hotel to advise occupants who appear at windows not to panic.

99. A sergeant and two patrolmen answer a disturbance call from the owner of a small neighborhood tavern. Witnesses state that three men were arguing over who had the next game on the pool table when two of the men started punching the third man. When the owner tried to stop the fight, the two men threatened him with bodily harm. The two men have now left the tavern. The sergeant should see that the patrolmen

1. administer first aid to the victim.
2. make an immediate area search for the offenders.

3. obtain a signed complaint from the tavern owner.
4. call a tactical unit for assistance.
5. call the field lieutenant.

Mark on your Answer Sheet the letter indicating your choice from the list below.

a. 1, 2, 3
b. 1, 2, 5
c. 1, 3, 5
d. 2, 3, 4

100. A patrolman responds to a call. He arrives and finds a man dressed in work clothes lying on the floor of a partially painted apartment. The man is dead and it appears from his position on the floor that he has a broken neck. The patrolman observes a ladder standing nearby with an open can of paint the same color as that being used on the walls. The paint brush is lying on the floor near the dead man. The patrolman calls his sergeant for advice. The sergeant should advise the patrolman to

a. report it as an accidental death and call for a squadrol to remove the body.
b. make no assumptions and call for a Criminal Investigation Division investigation.
c. report it as an accidental death but call in the Criminal Investigation Division to verify it.
d. assume it is a homicide but investigate further before calling in the Criminal Investigation Division.

When you have finished the examination, Raise your Hand. The Proctor will signal for you to bring your test materials to the Desk. Please Remain at the Desk while the Proctor:

1. Counts the pages in your booklet.
2. Signs the booklet receipt form.

When you have witnessed the signing of the booklet receipt form, the Proctor will return your fingerprint card and direct you to the fingerprint station. You must be fingerprinted before you leave the building.

INSTRUCTIONS.

This is your test booklet. Open it only when you are told to do so. This booklet contains 100 questions and 28 pages. Check your booklet to see that it is complete. This is your responsibility. You will have 3 hours to complete this test. This time limit is set so that almost all candidates will finish the test even if they take their time and answer the items carefully. It is to your advantage to answer all the items in the test.

Only materials given to you by the civil service commission should be on your desk. Take all other materials off your desk.

This page contains directions on the use of the separate answer sheet which has been handed to you.

Each of the questions in this booklet has several suggested answers, lettered a, b, c, and d. Read each question and its lettered answers in the Examination Booklet. When you have decided which answer is correct or most nearly correct, blacken the space between the dotted lines on your answer sheet which is lettered the same as the answer you have selected. Be sure that the space you mark is in the row numbered the same as the question you are answering. Look carefully at your Answer Sheet. Note that the questions are numbered *Across* the page. Be sure that the space you mark is in the row numbered the same as the question you are answering.

Sample

1. Chicago is a

Sample Answer Sheet.

	a	b	c	d
1.	....	....	....	....
	....	....	....	....

a. county
b. city
c. suburb
d. village

Chicago is a city, so answer space "b" has been blackened. note carefully:

1. Use only a No. 2 pencil for marking.
2. Make your marks as long as the pair of dotted lines.
3. Make solid marks heavy and black.
4. Mark only one answer for each question.
5. Do not make any stray marks on the Answer Sheet. (Such marks may be counted as errors.)
6. *Erase completely* any answer you wish to change.

This test booklet is the property of the Chicago Civil Service Commission. Failure to return this booklet will subject you to disqualification.

Supreme Court, U. S.
FILED
APR 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUPPLEMENTAL APPENDIX.

UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

This supplemental appendix sets forth the opinion below of the United States District Court for the Northern District of Illinois. It is reported at 411 F. Supp. 218 (1976).

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* CITY OF CHICAGO, et al., *Defendants*.	Nos. 73 C 2080 70 C 2220 73 C 1252 75 C 79
RENAULT ROBINSON, et al., *Plaintiffs*, *vs.* JAMES B. CONLISK, JR., et al., *Defendants*.	
TADEO ROBERT CAMACHO, et al., *Plaintiffs*, *vs.* JAMES B. CONLISK, JR., et al., *Defendants*.	
RENAULT ROBINSON, et al., *Plaintiffs*, *vs.* WILLIAM E. SIMON, et al., *Defendants*.	

MEMORANDUM DECISION
January 5, 1976.

SUPPLEMENTAL MEMORANDUM AND FINAL DECREE
February 2, 1976.

* * * * *

MEMORANDUM DECISION

MARSHALL, *District Judge*.

The defendants in these complex, consolidated civil rights cases, which involve sexual and racial discrimination in the Police Department of the City of Chicago, are now pursuing their fifth[1] interlocutory appeal to the Court of Appeals for this circuit. We understand that the appeal has been fully briefed and is set for oral argument on January 6. In these circumstances considerations of policy (but not jurisdiction[2]) could suggest that we stay our hand in deciding the merits of the cases until the Court of Appeals has spoken. This is so because while the legal issue on appeal is a narrow one, the propriety of our November 13, 1975 refusal to vacate an earlier order preliminarily enjoining current payments of so-called revenue sharing moneys to the City,[3] the factual issues in the cases are so inextricably interwoven with the legal issues—including that of the revenue sharing cut-off—that guidance beyond that narrow, albeit important, question might be forthcoming from the Court of Appeals. We have concluded, however, that we should not defer our decision on the merits of certain of the issues in the cases.

When the revenue sharing injunction was first entered against the Secretary of the Treasury and others by the District Court for the District of Columbia, the City appealed to the Court of Appeals for this circuit from our refusal to issue a countermanding injunction. It also sought review of the Secretary's decision to comply with the District of Columbia injunction. After the Court of Appeals observed in an unpublished

1. *United States et al.* v. *City of Chicago et al.*, 74-2048-49, 75-1151, 75-1152, 75-1515 and 75-2073 which is pending.

2. The merits of the case remain here. *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F. 2d 623 (2d Cir. 1962).

3. *United States et al.* v. *City of Chicago, et al.*, 405 F. Supp. 480 (N. D. Ill. 1975).

memorandum order that the appeal should have been taken to the Court of Appeals for the District of Columbia,[4] the City dismissed the appeal and its petition for review.

The revenue sharing case was then transferred here on the City's motion under 28 U. S. C. § 1404(a). Upon its arrival, the City requested that we modify or vacate the injunction. After an evidentiary hearing, we adopted the injunction, approved it and refused to vacate or modify it.[5] The City did not appeal that order. Now, truly at the eleventh hour, it has appealed from the denial of an identical motion.

Furthermore, as we noted in denying the City's most recent revenue sharing motion, we have already once postponed this decision on the merits awaiting the results of another narrow interlocutory appeal taken by the Arado intervening defendants who deemed themselves aggrieved by our refusal to enjoin the Police Department's temporary sergeants program which was unilaterally announced by the Department while the cases were in trial on the merits. The briefs in that appeal, while purporting to speak only to the question of our refusal to enjoin the temporary sergeants program, launched a full scale attack on our preliminary injunction findings of fact[6] and then proceeded to argue evidence adduced at the trial on the merits which we had not yet passed upon. Thus, we waited for the Court of Appeals to rule. When it did, it did not get drawn into the thicket of facts. It limited its unpublished memorandum order of affirmance to the matter of the temporary sergeant appointments pointedly observing that "nothing stated herein is intended to have any bearing whatsoever on any issue on the merits now pending before the district court."[7]

4. *United States et al.* v. *City of Chicago*, 74-2048-49 (7th Cir. Jan. 3, 1975).

5. 395 F. Supp. 329 (N. D. Ill. 1975).

6. 385 F. Supp. 543 (N. D. Ill. 1974).

7. *United States et al.* v. *City of Chicago et al.*, 525 F. 2d 695, 75-1515 (7th Cir. 1975), p. 6.

Within days of that affirmance, the City was back with its renewed request for interlocutory relief in respect to revenue sharing. When that request was denied, the pending appeal followed.

In light of this record, and in view of the numbers of parties to this action who are represented by separate able counsel, we have concluded that the numbers of potential interlocutory appeals are limited only by the ingenuity of counsel. Indeed, the next may be triggered by the Department's new method of selecting patrol officers which the parties, the public and the court have awaited since April, 1974.

Additionally, we understand that the City has taken the position in the pending appeal that separate interlocutory relief is warranted because we have unduly delayed our decision on the merits. That argument, having been addressed to the Court of Appeals, is not for us to decide. Suffice it here to observe that the delay has been occasioned in part by the overall history of the case, in part by the size of the task confronting us,[8] in part by our previously noted deference to an earlier interlocutory appeal, and in part by our view expressed in November 1974 that "It is far better in cases of this nature that the remedy come from the parties rather than the court."[9] That view was, in reality, a hope which had been spawned by the City defendants' repeated representations that a new, non-discriminatory, unisex method of selecting patrol officers was in the offing. First made at a pretrial conference held April 10, 1974, the representation was repeated in testimony given by witnesses called by the City defendants during the preliminary injunction hearings held in June of that year (the estimate was then the fall of 1974), urged as a ground for mootness as far as allegations of sex discrimination were concerned, raised again during the hearings relating to revenue sharing in January 1975, again

8. There have been more than 60 days of testimony, the transcript exceeds 10,000 pages plus hundreds of pages of depositions and of exhibits.

9. 385 F. Supp. 561.

during the trial on the merits held in March-June, 1975, and periodically since then through *in camera* disclosures to the court and counsel, the last of which occurred on October 31, 1975. Still the results of the new method of selection have not been made known.

The delay in the new method of selecting patrol officers has not been our only frustration with respect to a remedy coming from the parties. There was also the arrogant, contumacious refusal by the City defendants to honor their interim hiring agreement and our order approving it of December 16, 1974. When, in the Spring of 1975, we were urged by the plaintiffs to proceed against the City defendants for their wilful refusal to abide the terms of that order (which would have recognized the aspirations of at least 500 of the men holding places on the 1971 patrolman's eligibility list), we were importuned by the defendants to stay our hand until the results of the new unisex methods for selecting patrol officers were known. Unwisely, in retrospect, we did just that.[10]

Thus, we have concluded that the time has come for the court to fashion a remedy.

Finally, there is the possibility that the Court of Appeals will find helpful, in its consideration of the issue before it, our findings and conclusions with respect to the merits of the case. Compare, *Silverthorne* v. *Laird*, 460 F. 2d 1175 (5th Cir. 1972). This is particularly so in light of our conclusion that the City defendants have knowingly discriminated against women, blacks and Hispanics in the employment of police officers and that the most effective remedy to cure that constitutional malaise is the economic sanction of withholding revenue sharing funds until those defendants meet the affirmative requirements of a decree entered pursuant to this decision.

For these reasons, then, we proceed to a decision on the merits of all of the principal issues in the cases save racial discrimination in discipline and the essentially private claims raised

10. 395 F. Supp. 329.

by the plaintiffs in *Robinson* v. *Conlisk*, 70 C 2220, at all times cognizant of the superior position, wisdom and objectivity of the Court of Appeals. What follows will stand as our findings of fact and conclusions of law and reasons for our decision pursuant to Rules 52(a) and 65(d), *Fed. R. Civ. P.* We adopt and incorporate by reference our earlier decisions of April 24, 1974 (*Robinson* v. *Conlisk*, Ill. 385 F. Supp. 529), April 24, 1974 (*United States* v. *City of Chicago*, Ill., 385 F. Supp. 540), November 7, 1974 (*United States* v. *City of Chicago, Ill.*, 385 F. Supp. 543), April 21, 1975 (*United States* v. *City of Chicago*, Ill., 395 F. Supp. 329), and November 13, 1975 (*United States* v. *City of Chicago*, 405 F. Supp. 480). Because issues will remain to be adjudicated after the entry of the decree pursuant to this memorandum, we find that there is no reason to delay the entry, enforcement of or appeal from that decree and we direct the clerk of this court to enter the decree when it has been presented and signed as a final one pursuant to Rule 54(b), *Fed. R. Civ. P.*

Before turning to the merits, a brief history of the litigation and its parties and the issues is in order.

I. THE HISTORY OF THE LITIGATION

The litigation originated on September 9, 1970 with the complaint of Renault Robinson and the Afro-American Patrolmen's League against the City, James B. Conlisk, Jr., who was then the City's Superintendent of Police, and the members of the City's Police Review Board. 70 C 2220. Robinson is a black Chicago Police Officer and the League is composed of black Chicago Police Officers. The complaint alleged violations of plaintiffs' First, Fifth, Thirteenth and Fourteenth Amendment rights and sought relief under 42 U. S. C. §§ 1981 and 1983, 28 U. S. C. § 1343(3) and 28 U. S. C. § 1331. The action was first assigned to Judge Parsons, who recused himself,[11] reassigned

11. Minute Order of September 24, 1970.

to Judge Marovitz and then to Judge McGarr. During its pendency before Judge McGarr, the case moved through a series of contested discovery proceedings and motions addressed to the pleadings. On April 11, 1973 plaintiffs filed their second amended complaint. Defendants moved to dismiss or alternatively for summary judgment. That motion was denied by Judge McGarr in an opinion filed September 19, 1973.

On May 13, 1973 Tadeo Robert Camacho and others, Hispanic and black who had sought appointment as Chicago Police Officers, filed their complaint against the City, Conlisk, the members of the Civil Service Commission of the City and Charles A. Pounian, the Secretary of the Commission. 73 C 1252. Alleging discrimination in employment in violation of their Fourteenth Amendment and statutory rights, plaintiffs sought relief under 42 U. S. C. §§ 1981, 1985, 2000d *et seq.* and 2000e *et seq.* The action was assigned to Judge Parsons, where it remained, moving through some discovery and a denial of defendants' motion to dismiss.

On August 14, 1973, the United States of America filed its complaint against the City, Conlisk[12] and the Civil Service Commission of the City. 73 C 2080. The Government alleged a pattern and practice of racial and sexual discrimination by the defendants in respect to employment, promotion, assignment and discipline in the Police Department, all in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U. S. C. § 2000e *et seq.*, the Fourteenth Amendment and 42 U. S. C. §§ 1981 and 1985, and later, by amendment, the State and Local Fiscal Assistance Act of 1972, 31 U. S. C. §§ 1221 *et seq.* It also sought enforcement of the regulations and guidelines of the Department of Justice and the Law Enforcement Assistance Administration, 28 C. F. R. 42.201 *et seq.* and 42.301 *et seq.*

12. James Rochford as Superintendent was substituted for Conlisk on March 14, 1974 in 73 C 2080 and as the memberships of the defendant Board and Commission have changed, appropriate substitutions have been made.

The action was assigned to Judge McMillen as related to an earlier action brought by the United States against the City alleging similar discrimination in the City's fire department. While the action was pending before Judge McMillen it was moving very swiftly toward a hearing on plaintiff's motion for a preliminary injunction.

On September 27, 1973, the Robinson case, 70 C 2220, was reassigned here from Judge McGarr as a part of our initial calendar. We called the parties in for a status report and directed them to resume their discovery. Shortly thereafter the Camacho plaintiffs in 73 C 1252, and the Government in 73 C 2080 filed statements with the Executive Committee of this court pursuant to our Local Rule 10 B 4 that their cases were related to 70 C 2220 and should be reassigned here. Some delay was experienced in respect to the reassignments but ultimately orders to that effect were entered and those two cases came here on February 15 and 20, 1974. We promptly convened a joint pretrial conference on March 5, 1974, at which we requested the parties to consider consolidation of the actions and stated our desire to proceed with the hearing on the motion for a preliminary injunction in the Government's case, 73 C 2080, on May 6, 1974, the date which had been scheduled by Judge McMillen.

The City defendants then moved for reconsideration of Judge McGarr's opinion and order denying their motion to dismiss or for summary judgment in the Robinson case, 70 C 2220. Briefs were filed. We reconsidered the motion and denied it on April 24, 1974. 385 F. Supp. 529.

The plaintiffs in the three cases jointly moved to consolidate them. The City defendants opposed the motion insisting that separate trials were required despite the fact that the cases had come here as related because they all involved allegations of employment discrimination in the Chicago Police Department. The motion to consolidate was granted. 385 F. Supp. 540.

On April 10, 1974 a consolidated pretrial conference was held regarding the hearing on the motion for preliminary injunction. At that conference defendants suggested that the need for a preliminary hearing was doubtful because they were at work on a new unisex method of selecting patrol officers.

The evidentiary hearing on plaintiffs' motion for a preliminary injunction in the consolidated action commenced on May 30, 1974, pursuant to Rule 65(a)(2), *Fed. R. Civ. P.*, *i.e.*, it was consolidated with the trial on the merits. On the eve of that hearing, Louis Arado, et al., who hold places on the 1973 sergeants promotion list, were granted leave to intervene as defendants with the consent of the City defendants. Henceforth, where appropriate, the City of Chicago and its several officers and employees will be referred to as the City defendants and the Arado defendants will be so designated. In addition, subsequent intervenors will be appropriately designated.

The preliminary injunction hearing consumed 17 trial days; testimony was concluded June 28, oral arguments were heard July 11, and thereafter the parties filed extensive written briefs in which the City defendants urged, *inter alia*, that the issue of sex discrimination was moot because, as their witnesses had testified, the new unisex method of selecting patrol officers would be ready by the fall of 1974.

On June 28 a consent decree settling certain height, weight, vision and medical requirements was entered. On November 7, 1974 we filed an opinion and issued a preliminary injunction directed particularly at the uncontroverted showing of discrimination against women, the 1971 patrolman's roster and the 1973 sergeants promotion list. 385 F. Supp. 543. Shortly thereafter we set the consolidated action for trial on the merits to commence January 6, 1975.

All of the defendants appealed from the preliminary injunction order. Subsequently they dismissed their appeals.[13]

On December 16, 1974, after extensive negotiations among the parties, plaintiffs and the City defendants agreed to an

13. *United States et al.* v. *City of Chicago et al.*, 75-1151 (7th Cir. Apr. 25, 1975); *United States et al.* v. *City of Chicago*, 75-1152 (7th Cir. May 21, 1975).

interim hiring program under which the City could appoint 600 patrol officers—500 from the 1971 patrolman's roster and 100 from a police matron roster. After hearings in open court, we approved that agreement and incorporated it into an interim hiring order. In doing so we noted the City's professed need for police officers and the fact that the remedy was coming from the parties, rather than the court. At the same time, in part because appeals were pending from the preliminary injunction order, in part to meet the convenience of the parties and in part because of the anticipated new "unisex" method of selecting patrol officers, we continued the trial on the merits to March 1975.

On February 7, 1974, just before the consolidated cases had arrived on our calendar, Renault Robinson, the Afro-American Patrolmen's League and the National Association for the Advancement of Colored People had commenced an action in the United States District Court for the District of Columbia against the Secretary of the Treasury and officials of the Office of Revenue Sharing (hereafter the ORS defendants). Plaintiffs alleged that the racially discriminatory practices of the City's Police Department, to which a major portion of the City's revenue sharing allotments had been allocated, violated Section 122(a) of the State and Local Assistance Act of 1972, 31 U. S. C. § 1242(a), and they sought injunctive relief in respect thereto. The history of that action has been reported in our memorandum decision of April 21, 1975, 395 F. Supp. 329, and need not be repeated here.

On December 18, 1974, the District Court for the District of Columbia acting in light of our preliminary injunction of November 7, enjoined the ORS defendants from making further revenue sharing payments to the City until it had complied with a final order of this court. There followed a frenzy of maneuvers by the City which included a collateral attack here on the District of Columbia order,[14] an appeal to the Court of Appeals for this Circuit and the City's unilateral repudiation of the interim

14. Hearings were held on December 18, 19, 23 and 26, 1974.

hiring agreement and order. Ultimately the District of Columbia action was transferred here on the City's motion, docketed at 75 C 79 and consolidated with the other actions. The result is that the Government finds itself in the anomalous position of being a plaintiff as to certain of the revenue sharing issues in the case and a defendant as to others. As we shall see, it has not entirely reconciled that dilemma.

It was about this time that Carolyn Burauer, et al., requested and were granted leave to intervene as plaintiffs. Ms. Burauer and her colleagues aspired to be patrol officers. They sought to represent the particularized views of women who had been discriminated against by the Police Department. They will be referred to as the Burauer plaintiffs.

Then came Roy Isakson, et al., who hold places on the 1971 patrolman roster. They were granted leave to intervene as defendants upon the condition that they dismiss a spate of state and federal court actions they had brought which, in effect, were collateral attacks on the November 7 preliminary injunction. The Isakson defendants' activities here have included, *inter alia*, the presentation of some 615 petitions bearing thousands of signatures "to hire the 1500 [on the 1971 patrolman roster]." Initially they aligned themselves with the City defendants. By the conclusion of the trial, however, they seemingly had joined forces with the plaintiffs for in their brief they urge a permanent injunction against "the use of the type of exams, physicals and procedures used [in respect to patrolmen] in 1971," the "full implementation of the interim hiring order" and "ratio . . . minority hiring in all prospective hiring." Br. of Isakson Defendants, p. 6.

In February, 1975, as the time for trial approached, it was discovered that the City defendants had falsely answered an interrogatory served upon them by the Robinson plaintiffs in 1971. The interrogatory had called for information relating to Department surveillance of Robinson and other offices of the League. The answer was:

> Department records reveal no surveillance has ever been conducted on Renault Robinson, or any other officer of the Afro-American Patrolmen's League.

Then in February, massive surveillance files were discovered—dating back to 1968—at least to the extent that they had not been destroyed by the City defendants in 1974, long after all of the actions had been pending and the interrogatories answered. But, we were told, the surveillance files were extraordinary [*sic*] sensitive and we were urged by the City's counsel in an *ex parte, in camera* conference to inspect them and use our restraint in ordering their disclosure. Inspect them we did—two brief cases full—and all of them pertained to Robinson and the League. While they contained large quantities of newspaper clippings and memoranda relating to surveillance of public meetings and testimonials at which Robinson and other League members were in attendance, they also contained appraisals and opinions of Robinson and the League which were clearly relevant to their claims here.

And then, on the eve of the trial on the merits, Nicholas J. McNamara, et al., who hold places on the 1970 lieutenants promotion roster were granted leave to intervene as defendants. They, too, have aligned themselves with the City defendants, but unlike the Isakson defendants, who appear to have changed their stance, or the Arado defendants, who have taken it upon themselves to defend not only the 1973 sergeants roster but the 1971 selection of patrolmen as well, the McNamara defendants have limited their efforts to defending the 1970 lieutenants roster and its underlying examination. As will appear in due course, they have succeeded.

The trial on the merits commenced on March 10. On that day, the City defendants announced unilaterally, without notice to the parties or leave of court, the promotion of 16 sergeants to the office of lieutenant, the program for the promotion of temporary sergeants and a new written examination for patrol officers. Each announcement provoked motions by all of the

remaining parties, except the McNamara defendants, for preliminary injunctions restraining the proposed actions. On June 6, the motions were denied following extensive hearings conducted intermittently during the trial as the dimensions of the proposals were disclosed. The Arado defendants appealed the denial of their motion and it was the decision on that appeal which we awaited as previously noted.

The new examination for patrol officers was given with our approval, on April 19, without advance disclosure of its contents. The results of the examination have been disclosed to the court and counsel *in camera* and subject to a stringent protective order which the parties have honored. Therefore, we shall not comment here on the results of that examination. So, too, have the results of the medical examinations been disclosed, under similar restrictions. But the results of the third, fourth and fifth phases of the new method—individual interviews, background checks and psychiatric interviews—have not been forthcoming.

The trial on the merits consumed 43 court days. It was concluded by closing arguments on June 26, followed by extensive written briefs.

There followed the affirmance of the temporary sergeants order and the City's renewed request that we vacate or modify the revenue sharing injunction. In respect to the latter, the City was supported by the Chicago Bar Association, the Chicago Crime Commission, the Civic Federation and the Southeast Chicago Commission, as *amici curiae*. While reminding us of their long standing stance against sexual and racial discrimination, the *amici* acknowledged their lack of familiarity with the record. Nevertheless, they asserted that the economic sanction of revenue sharing termination was inappropriate in the circumstances of the case. We shall treat that argument in the section of this opinion devoted to revenue sharing.

All of which brings us to the merits. As we address them, we observe that because all four of the individual actions were tried as a consolidated case, and because our acceptance of the

transfer of the District of Columbia revenue sharing case was conditioned on the parties' agreement that all prior proceedings here could and would be considered as a part of the proceedings in that case, and because each group of intervenors agreed to accept the record in the consolidated case as they found it, and finally, because the preliminary injunction hearing was held under Rule 65(a)(2), *Fed. R. Civ. P.*, all of the evidence adduced by the parties at any stage of the proceedings may be considered in respect to all of the issues presented, subject, of course, to normal standards of relevancy.

II. Sexual and Racial Discrimination in the Selection, Promotion, Assignment and Discipline of Police Officers

This part of this memorandum will address the subjects of sexual and racial discrimination in the selection, promotion and assignment of police officers within the Chicago Police Department. We will first consider discrimination against women. We will then turn to racial discrimination in the appointment of patrol officers, the promotion of sergeants and lieutenants and the assignment of officers. Part III of the memorandum will deal with the appropriate remedy, including that applicable to revenue sharing. Because the general claims of racial discrimination in discipline and the private claims of Renault Robinson and the Afro-American Patrolmen's League are so closely intertwined, they will be considered together and separately. A decree pursuant to this memorandum will be entered separately.

A. *Discrimination against women*

The Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, provides in material part:

> The term "person" includes . . . governments, governmental agencies [and] political subdivisions. . . . The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees. . . .
> The term "industry affecting commerce" means any activity . . . in commerce or in which a labor dispute would hinder or obstruct commerce . . . and . . . includes any governmental activity. . . .
> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . .

42 U. S. C. §§ 2000e(a), (b) and (h) and 2000e-2. There is no question that since March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972, this statutory prohibition against discrimination in employment on account of sex has been applicable to the Police Department of the City of Chicago.

In our preliminary injunction memorandum we found it undisputed that women had been and were being discriminated against by the City defendants in entry, employment, assignments and promotions in the Department, in violation of the Act. 385 F. Supp. at 548. We also found that the City defendants had not validated or justified that discriminatory treatment (385 F. Supp. 555) and we enjoined it. 385 F. Supp. 545. If anything, the conduct of the City defendants since then, together with the additional evidence adduced at the trial on the merits, have exacerbated the situation.

It was not until April, 1975—five months after the preliminary injunction issued—that the City defendants undertook any steps to implement their obligations under the decree and

the Act. At that time they issued an order allowing incumbent women to apply for reassignment, and permitted women to take the new patrol officers written examination, from which no appointments have been made. Prior to April, they had refused to honor the interim hiring agreement and order, which encompassed women, and since then they have failed to appoint any women from the 1972 matron roster, although the use of it was not in any way affected by the preliminary injunction. Even their voluntarily undertaken emergency temporary sergeants program produced no female promotions and had as one of its requirements an almost impossible hurdle for women: three out of the last five years of duty in a field assignment. In short, almost three years after the effective date of the Equal Employment Opportunity Act of 1972, two years after the commencement of the Government's action here and more than one year after the entry of the preliminary injunction, it is still business as usual insofar as women in the Chicago Police Department are concerned.

Furthermore, the additional evidence at trial showed that the entry training which women recruits have received in the past has been at the Training Academy along with and, in all essential respects, the same as that received by patrolmen recruits. On this record there can be no question that the preliminary injunction should be made permament in respect to the Department's discrimination against women.

An additional issue in respect to women arose during the trial and as a result of the April, 1975 announcement of the new "unisex" patrol officers examination. At that time the City defendants prescribed a minimum height of 5'4" for all applicants. Upon objection by the Government and the Burauer plaintiffs, the test was administered without the imposition of that requirement.

An employment requirement based on height appears neutral on its face. However, if the neutral requiremnent is shown to have a markedly disproportionate impact on a given class of

applicants, a *prima facie* case of discrimination is established. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

The evidence shows that while the announced 5'4" height requirement excludes only 7.5 percent of the eligible males, it will exclude 65 percent of the eligible females.

In these circumstances, the burden is upon the City defendants to validate the 5'4" requirement by proving that it is job related. Of course, physical strength, of which size is an element, is an important if not essential attribute for those who engage in much of the work which police officers do. But the difference between 5'4" and 5'3", which the evidence shows will markedly reduce the disparity in eligibility, is not so clear. This is paricularly so in light of the fact that historically, the Department's minimum height requirement for women has been 5'3". While women have, as we have seen, been discriminated against in their employment opportunities in the Department, the work to which most of them have been assigned—that of matrons and the handling of female prisoners —has required the attribute of physical strength.

Because the anounced height requirement has not been applied by the City defendants, it will not be specifically included in the injunction. But it does, in our judgment, fall within the scope of the decree's general prohibiton of discrimination against women, absent a persuasive showing of job relatedness which has not been made.

B. *Racial discrimination in the selection, promotion, assignment and discipline of the police officers*

We turn now to the question of racial discrimination in the selection of patrol officers and the promotion of sergeants and lieutenants by and within the Department. We first observe that no challenge has been made respecting promotions to the rank of captain or the selection of command personnel. Before con-

sidering the facts shown by the evidence, attention should be given to the principles of law which have governed our deliberations.

1. *Governing legal principles.*

Since our preliminary injunction decision in November, 1974 (385 F. Supp. 543), we have followed closely the decisions of other federal courts in the area of racial discrimination in employment (and particularly public police employment) for the purpose of identifying any which contradict, undercut or weaken the legal conclusions we expressed at that time and our application of them to the facts then before us. We have found none and the parties have called none to our attention. Accordingly, we reaffirm the legal conclusions we there expressed and apply them here with the following additional observations.

The defendants urge that the adoption by the Congress of the Federal Rules of Evidence, and particularly Rule 301 dealing with presumptions, has altered the burden of persuasion in respect to test-job relatedness which we have heretofore imposed on defendants. The issue has arisen as the result of the following passage in our earlier memorandum (385 F. Supp. at 553):

> In short, the disproportionate impact raises more than an inference of impermissible discrimination which a fact finder is permitted to draw. The conclusion of [impermissible] discrimination is in the nature of a presumption and is required unless the employer persuades the fact finder that the practices used fit the job, predict performance on the job, and are necessary for the on-going effectiveness and efficiency of the employing agency.

Rule 301 of the Federal Rules of Evidence, as enacted by the Congress, provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on which it was originally cast.

Thus defendants argue that, in our earlier decision, we imposed a burden of persuasion upon them which is now prohibited by Rule 301. It is evident that their argument stems particularly from our statement that "more than an inference" arises from disproportionate impact; "the conclusion of [impermissible] discrimination is in the nature of a presumption and is required unless the employer persuades the fact finder" of job relatedness.

As is frequently the case, a label—"presumpion"—for which we readily accept responsibility, has clouded analysis. The beginning point is Section 703(h) of the Civil Rights Act of 1964 which provides in material part:

> . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color . . . or national origin. . . .

42 U. S. C. § 2000e-2(h).

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), the Supreme Court spoke directly to the subject at hand.

> . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
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> • • • • •
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. . . .
>
> • • • • •

> . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

401 U. S. at 431, 432, 91 S. Ct. at 853, 28 L. Ed. 2d at 164. Emphasis in original.

Clearly the Court read the Act as imposing upon the employer the burden of proving that any test which excludes an identifiable racial group is "related to job performance," "bear[s] a demonstrable relationship to successful performance" and has "a manifest relationship to the employment in question."

If any doubt remained it was laid to rest in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280, 43 U. S. L. W. 4880 (1975). There the Court considered a situation almost identical to that presented in *Griggs* save for the fact that the emlpoyer did adduce evidence of job relatedness. The Court said:

> In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 [91 S. Ct. 849, 28 L. Ed. 2d 158], this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.' *Id.*, at 432 [91 S. Ct. at 854, 28 L. Ed. 2d at 164].[21] This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.

422 U. S. at 425, 95 S. Ct. at 2375, 45 L. Ed. 2d at 301. Footnote 21 to the Court's opinion read, "In *Griggs* the Court was construing 42 U. S. C. § 2000e-2(h)," which has been previously quoted. The Court then went on to affirm the holding of the Court of Appeals for the Fourth Circuit that Albemarle's evidence of job relatedness was insufficient.

Thus it is clear that it is the Act which imposes the burden of proof of job relatedness of [*sic*] the employer. And this Circuit, as well as others, has held that burden of proof to include "the burden of going forward and the burden of persuasion." *United States* v. *United Brotherhood, etc.*, 7 Cir., 457 F. 2d 210, 214, *cert. denied*, 409 U. S. 851, 93 S. Ct. 63, 34 L. Ed. 2d 94 (1972); *Vulcan Society, etc.* v. *Commission*, 490 F. 2d 387, 393 (2d Cir. 1973); *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 120 (5th Cir. 1972). That application of the concept of burden of proof is consistent with the overwhelming weight of authority. *McCormick on Evidence* (Clearly ed. 1972) §§ 336 *et seq.*

Finally, assuming *arguendo* that appropriateness of our earlier use of the term "presumption," which we must say we now question,[15] it is clear from the express language of Rule 301 that its prohibiton regarding "the risk of non-persuasion" has no application here for this is a case which is "otherwise provided for by Act of Congress."

As a consequence of the foregoing, we are confident that the standards we used in evaluating the evidence adduced during the preliminary injunction hearing were correct and we will apply them now to all of the evidence which has been presented on the issues of racial discrimination in employment and promotion in the Department.

2. *Patrol officers*

The issues here remain the same as at the preliminary injunction hearing—the discriminatory effect of the 1971 patrolman examination and the like effect of the results of the Department's background check. The only fresh evidence adduced at the trial on the merits consisted of the testimony of certain men who hold positions on the 1971 patrolman roster, the entry requirements

15. Test validity is in the nature of a defense to the charge of discrimination rather than a fact which contradicts the *prima facie* showing of discrimination.

of other law enforcement agencies, including the FBI and the Illinois Bureau of Investigation, and some statistical data regarding the racial breakdown in population and work force. In addition, the defendants urge that we did not give adequate consideration or fair weight to the preliminary injunction testimony of Professor Edwards who, on the eve of that hearing, was hired to validate the 1971 examination. Nor, they urge, did we give proper consideration to the necessity for and methods employed in conducting the background check.

None of our earlier statistical findings regarding the racial impact of the 1971 patrolman examination have been challenged. The Arado defendants, however, apprehensive of the effect on them of a finding of cumulative discriminatory tests, have urged that the starting point of our analysis—the racial mix of the City—as improper; that we should have started with the racial mix of the Chicago and the greater metropolitan area labor forces.

The evidence shows that in 1960 the male population of Chicago was 76.5% white, 22.5% black and 1% "other," while the male labor force was 81.5% white and only 18.5% black. In 1970 the male population of Chicago was 60.1% white, 32.1% black and 7% Spanish, while the male labor force was 67% white, 25.8% black and 7.2% Spanish. Furthermore, the male labor force for the greater metropolitan Chicago area for 1970 was 86.5% non-black and 13.5% black. These latter statistics are relevant, we are told, because from 1966 until December 4, 1971 (the date the challenged 1971 patrolman examination was given), Chicago police officers were not required to reside in Chicago.

Having established their statistical base, the Arado defendants proceed to argue that "events such as the Martin Luther King riots, the 1968 Democratic Convention confrontations, and the 1969 Black Panther raid, resulted in an antagonism of blacks against the Chicago Police Department and reduced the number of blacks who sought positions in the Department.

Closing argument of Arado defendants, p. 13.[16] From this the Arado defendants conclude that: "the Government's claim of past discrimination and underrepresentation is unsupported by the evidence in this case." *Id.*

The most striking aspect of the argument is that in 1971, when the male labor force in Chicago was only 25.8% black, and the Department (we assume we are to infer) still suffered from a "reduced . . . number of blacks who sought positions in the Department," blacks comprised 29+% of the men who wrote the 1971 patrolman examination. Thus, it appears that black male interest in the Department was up rather than down.

Of course, those 1971 black males failed the examination at a rate of 67% while whites failed at a rate of only 33%, and that factor together with other selection criteria, *i.e.*, place on the roster and background check, resulted in a black male hiring rate of only 10%. The primary inquiry is whether "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra.* Accepting the Arado defendants' statistical starting point of black males in the labor market, the result of the 1971 patrolman examination is the same: a grossly disproportionate impact on blacks.

The second aspect of the Arado argument which is intriguing is their adoption of the testimony of plaintiffs' witness Furcon concerning the efforts in the 1960's "of then-Superintendent, O. W. Wilson, to professionalize the Department and to seek selection devices and procedures to attract the most capable people to become Chicago policemen." Closing argument of Arado defendants, p. 12. One of the characteristics of the administration of "this farsighted man" (*Id.*) was a racial mix in the Department of 22%-26% at a time when the black population in the City was approximately 25% and the Chicago black male labor force was between 18.5% and 25.8%.

16. In a different context the Robinson plaintiffs add the "shoot to kill" order allegedly issued during the riots which followed the assassination of Dr. King.

Those statistics should be compared with the present racial profile of the Department: 83% white, 16% black and 1% Hispanic following a 1970 patrolman examination which black applicants failed at a rate of 77%, Hispanics 70% and whites 42%, and the 1971 examination which, as we have noted, blacks failed at a rate of 67%, Hispanics 68% and whites 33%. And the "far-sightedness" of the 1960's must be compared with the testimony of former Superintendent Conlisk and his successor, incumbent Superintendent Rochford, with respect to the 1972 report of the Law Enforcement Assistance Administration. That report clearly put the City defendants on notice of the adverse effect that the Department's employment practices were having on minority groups. Yet Conlisk disparaged the report as a "numbers game" which was of "no concern" to him. Rochford, on the other hand, had not bothered to look at the report since becoming Superintendent and had no plans to do so; nevertheless, he disagreed with the report's conclusions.

There can be no doubt that the evidence which we have previously summarized at 385 F. Supp. 548-550 showed that the 1971 patrolman examination had a grossly disproportionate impact upon blacks and Hispanics. Accordingly, it was a discriminatory and therefore, unlawful method of selection. Furthermore, from their experience with the 1970 examination, which was in all essential respects the same as that used in 1971, the City defendants knew that the 1971 test was discriminatory.

Defendants' argument that other law enforcement agencies, including the FBI and the IBI, use entry tests of like nature need not detain us. In the first place, we note that as time passes those tests are being declared invalid under the Civil Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment. See *Davis* v. *Washington*, 168 U. S. App. D. C. 42, 512 F. 2d 956 (1975), and cases there collected. Furthermore, while the general practice in a trade or industry may be relevant to prove a standard of care, it has never, to our knowledge, been a defense to a charge of discrimination that everyone does it

Insofar as Professor Edwards' testimony was concerned, we did give it careful consideration in our earlier opinion and we accorded it the weight to which it was entitled. See 385 F. Supp. at 555-556. With all respect to him, it did not show that the 1971 patrolman examination bore "a demonstrable relationship to successful performance of the job for which it was used." *Griggs* v. *Duke Power Co., supra*, 401 U. S. at 431, 91 S. Ct. at 853, 28 L. Ed. 2d at 164.

The defendants have not challenged the preliminary injunction findings with respect to the content, use and disproportionate racial impact of the results of the Department's background investigation of police officer candidates. 385 F. Supp. at 549-550, 556-557. Instead, they urge that the investigative standards of other law enforcement agencies and two recently reported decisions, *Green* v. *Missouri Pacific R. R. Co.*, 381 F. Supp. 992 (E. D. Mo. 1974), and *Lane* v. *Inman*, 509 F. 2d 184 (5th Cir. 1975), establish that we erred in holding that the investigations had not been shown to be job related. *Green* and *Lane* both hold that a prior conviction of a serious offense is, as a matter of law, a valid ground to refuse employment and a license to operate a taxicab, respectively.

Green and *Lane* need not detain us for we agree that a prior conviction of a serious offense would be a valid ground to disqualify a person from police work. And this would be so regardless of the disproportionate racial impact such a standard might have.

Furthermore, we agree that the investigative standards of others do tend to show the need for flexibility in inquiries of this type. But we did not enjoin flexibility in background investigations; we enjoined the standardless application of the unknown in arriving at undefined results in those investigations. All the record shows is that the Department inquires into bad character, immoral conduct and dissolute habits (which the chief administrator of the investigations could not define). In reaching those conclusions inquiry is made with regard to a candidate's educa-

tion, employment, financial condition, arrests, military service, driving history, and the arrest records of members of his or her family. We have not been given any insight into specific types of negative information that will disqualify a candidate, which may fall into these categories or be learned from these sources. All we know is that across the board, black candidates have been disqualified at a rate 40% greater than white candidates and at a rate of 2 to 1 on the basis of "arrest record" and 3 to 1 on the basis of "negative employment record." When requirements for employment have such a disproportionate impact, they must be defined so that their validity can be determined. The City defendants have declined to provide that definition. Accordingly, the injunction with respect to the use of the results of the background investigations will be made permanent.

What remains is the interest of those men who hold positions on the 1971 patrolman roster—manifested in court by the testimony of a representative sampling of them. They urge that they took and passed the test in good faith and that they should not be penalized by a retrospective determination that the test was discriminatory.

The Constitution and the Civil Rights Act dictate that in cases of this nature, the rights of the victims of discrimination be held paramount. The correlative is that the interests of the unknowing "beneficiary" of the discrimination must be subordinated. This is so because the "beneficiaries" can have no rights which have the unlawful discrimination as their origin.

We sit, however, as a court of equity. As such, we can and should undertake to shape a remedy which will disappoint, as little as possible, the aspirations of those who took and passed the 1971 examinations in the belief that it was valid. That was a key factor in the decision to approve the interim hiring agreement. That evidently was the intended thrust of the defendants' witness Ornstein. That is what the Isakson defendants request in their final brief. To the extent permissible, we will, in fashioning a decree, seek to respect those aspirations.

For the foregoing reasons and for the reasons stated in the preliminary injunction memorandum, those portions of the preliminary injunction dealing with the appointment of patrol officers from the 1971 patrolman roster, the utilization of the results of the 1971 patrolman examination and the utilization of the results of the Department's current background investigation in the appointment of patrol officers will be made permanent except to the extent otherwise provided in the portion of this memorandum dealing with the appropriate remedy.

3. *Sergeant promotions*

The defendants' most vigorous attack against the preliminary injunction findings and conclusions has been made on the issue of promotions from the 1973 sergeant roster. Here they argue that we misapplied the burden of proof, failed to credit properly the preliminary hearing testimony regarding content and concurrent validity of the 1973 sergeant examination, and did not judge correctly the reliability and job relatedness of the Department's efficiency ratings. In short, we were all wrong.

To bolster their contentions defendants adduced expert testimony regarding the validity of the 1973 examination and substantial, impressive testimony from certain men holding positions on the 1973 roster as to their preparation for the examination.

The starting point is the "*consequences* of the employment practices." *Griggs, supra*, 401 U. S. at 432, 91 S. Ct. at 853, 28 L. Ed 2d at 164, emphasis in the original. What were the results of the 1973 sergeant examination? They were uncontroverted and as distressing as the results of the 1971 patrolman examination. In 1973 blacks and Hispanics comprised 17% of the 11,431 patrolmen in the Department. They made up 20% of the pool of 6555 patrolmen who took the sergeant examination, again indicating a higher interest rate than their percentage of the available "labor force" would cause one to predict. But, only 13% of those who passed the test were blacks

and Hispanics and only 7.2% of those with a reasonable expectation of promotion were. The practical success rate of whites versus blacks and Hispanics was 7.07% to 2.23% or 3 to 1. 385 F. Supp. 550-553.

The defendants argue that this showing of disproportionate impact does not shift the burden to them under *Griggs* and *Albemarle* because this is a promotion test. That fact enters into the ultimate appraisal of the test and may be relevant to the question of the appropriate remedy, but it does not exempt the test from the commands of the equal protection clause or the Civil Rights Act of 1964. And this is particularly true where the pool of applicants was largely made up of persons who were accepted into the Department on the basis of the discriminatory patrolman examinations given in 1970 and 1971 and the showing that the 1968 sergeant examination had been similarly discriminatory in its results. 385 F. Supp. 550.

We earlier placed the burden of proof on the City defendants and it remains there. Thus, they were obliged to persuade us of the job related validity of the 1973 sergeant examination.

The burden of persuasion has as one of its benchmarks, the credibility of the witnesses and the weight to be given to their testimony. During the preliminary injunction hearing the defendants placed their stock in this regard in Dr. Charles A. Pounian, a defendant in his capacity as Secretary of the City's Civil Service Commission. Dr. Pounian testified at length on the issues of cor :nt and concurrent validity. As to the former, he testified to the enormous energies—four man years—that were devoted to the preparation of the job description which preceded the preparation of the examination. He also testified to his concurrent validity study in which the examination was given to 88 pairs of black-white sergeants with their examination scores being correlated with their efficiency ratings. And while other experts similarly testified in support of the examination, their testimony was based entirely on Pounian's; they were experts approving an expert.

As we wrote in November, 1974, we had misgivings about the substance of the content and concurrent validity studies, and we still do. 385 F. Supp. 557-560. But we also made clear that we h misgivings about the credibility of the testimony given with respect to the studies.

During the preliminary injunction hearing, Dr. Pounian changed his testimony twice while on the stand and his counsel sought to change it a third time by a letter to the court after the hearing was concluded. 385 F. Supp. 558. The two in-court changes were preceded by knowledgeable cross-examination. Nor were the changes mere "computational errors" by subordinates as defendants have urged. From our comprehension of the theory behind and purpose of the testimony, they so adversely affected the results that "[n]one of the third set of correlations reache[d] a level of practical significance in the judgment of either of defendants' expert witnesses, Dr. Pounian or Dr. Ebel." 385 F. Supp. 559.

Nothing was done during the trial on the merits to bolster Pounian's credibility or that of his studies. But events transpired and evidence was adduced which, while not reflecting directly on Pounian, did reflect on the general credibility of the City defendants' case. We speak of the previously mentioned concealment and destruction of intelligence files relating to Renault Robinson and the officers of the Afro-American Patrolmen's League.

There is no question that the files were concealed in 1971 when the City defendants denied their existence. Only when plaintiffs renewed their discovery requests as the case neared trial on the merits did counsel for the City defendants insist that the files be produced. And then it was disclosed during the trial that certain of the files had been destroyed as late as April, 1974 on the eve of the preliminary injunction hearing.

The credibility which a trier of fact extends to a litigant's case is multi-faceted. In the final analysis it is a question of confidence in the proof. In the light of this record, we do not

have that degree of confidence in the City defendants' evidence respecting the content and concurrent validity studies of the 1973 sergeant examination as to be persuaded by them.

The defendants did, however, undertake to bring greater credibility to the 1973 sergeant examination by calling as an expert witness Dr. Philip Ash of the faculty of the University of Illinois and a person of impeccable credentials. He testified to a number of analyses he made of the examination long after the preliminary injunction hearing. He was permitted to testify out of order so that he could present his views here and meet another professional commitment in Africa.

In his opinion the 1973 written sergeants test is content valid because the Civil Service Commission's job analysis (about which Dr. Pounian testified) was thorough and professional. The specification of tasks into six "exam" categories was correct. The specification of items for coverage was realized by actual items that were included in the test. The match between the content of the job and the content of the test was a close one. The content validity was established in accordance with the EEOC Guidelines and the American Psychology Association Standards.

He validated the examination by his own concurrent validity study. That study yielded correlation coefficients significant at the 1% level; the relationship between performance and test scores was linear and the correlation coefficients had practical significance. In his opinion the 1973 examination provided a practical means of significantly improving the quality of personnel at the sergeant level.

Finally, Dr. Ash performed a differential validity study to test for possible bias of the 1973 sergeant examination against blacks. He found that the 1973 examination produced correlation coefficients significant at the 1% level for blacks and whites separately. He further found that the regression equations for blacks and whites were virtually identical, *i.e.*, that the 1973 examination did not overpredict or underpredict the performance

scores for whites or blacks. These findings, in his opinion, established that the examination was not biased against blacks.

On cross-examination it was disclosed that certain of the opinions which Dr. Ash expressed here were at sharp variance with opinions he had recently expressed in other similar cases. For example, he testified that one of the purposes of the examination was to test judgment and, indirectly, psychological characteristics. When he was asked to affirm that a paper and pencil test cannot adequately determine whether a candidate has the necessary judgment and psychological characteristics required of a police officer, he declined to do so. Yet it was disclosed that when he testified for the plaintiffs in *Morrow* v. *Crisler*, 491 F. 2d 1053 (5th Cir. 1974), an action which challenged successfully the entrance examination used by the Mississippi Highway Patrol, he had stated unequivocally that a pencil and paper test could not adequately determine those characteristics.

In respect to his testimony concerning content validity, he agreed that the ultimate purpose of the examination was to select people for job performance as sergeants and that the job was one with diverse duties. He was then asked if, in those circumstances, content validity was not rejected by knowledgeable authorities as a validation technique. He responded in the negative. Then it was disclosed that he had given precisely that opinion in *Morrow* v. *Crisler*, *supra*, when he testified in support of the plaintiffs' challenge of the test there.

On direct examination Dr. Ash had stated that there were no feasible alternatives to paper and pencil examination (which the evidence shows tends to have built-in biases against blacks) when large numbers of applicants are to be tested. He repeated that opinion on cross-examination and then was confronted with his contrary testimony for the plaintiffs in *Douglas* v. *Hampton*, 168 U. S. App. D. C. 62, 512 F. 2d 976 (1975).

In this latter regard, it should be noted that while Dr. Ash's testimony was given after the announcement of the 1975 temporary sergeants program, it preceded the results of the program.

There, the Department selected qualified persons for the position of sergeant without discriminatory results and without a paper and pencil examination.

We hold Dr. Ash in high regard. He is an outstanding figure in his field who has given unstintingly of his time in cases of this nature. But his testimony has not persuaded us that the 1973 sergeant examination is a valid predictor of performance on the job. That, as we understand it, is the test we are to apply in testing the testers. We remain confident of our preliminary findings and conclusions in respect of the 1973 sergeant examination and they are reaffirmed.

The Arado defendants also elicited the testimony of several men, who passed the 1973 examination, that they had studied for it. In the main they studied the general orders of the Department. They also testified that they had failed the 1968 examination when they had not studied. We are told that the testimony was offered to rebut the "bunk" of white "test-wiseness" advanced by the plaintiffs (Arado defendants' closing argument, p. 45) and that it shows that the test was content valid. We are somewhat at a loss as to how evidence of study for an examination rebuts the generally accepted premise that whites tend to do better on written examinations which require reading skills than do blacks. That is what we understand "test-wiseness" to mean. And the Arado defendants' witness, Dr. Ash, did not regard the reading-performance disparity between blacks and whites as "bunk."

The evidence regarding the Department's efficiency rating and their use in making promotions has always been troublesome. The average difference in ratings between black and white patrol officers for the period January-June 1973 (which was the relevant period for the 1973 sergeant roster) was less than one point: 84.3 to 85.2. Now the evidence also shows that there was no black-white difference in the efficiency rating for sergeants in the period relevant to the 1970 lieutenant roster.

On the record as now constituted, it is clear that our preliminary injunction was too broad for we enjoined the use of the ratings "as a standard or factor for promotion" without limiting the restraint to sergeant promotions, although that certainly was our intent. And the parties so regarded it, for the ratings were used in making the lieutenant promotions in March 1975.

Upon reflection we have concluded that we erred in respect to the efficiency ratings generally. The one point black and white difference is too slight, although we still observe that in reality it is a one point difference on a scale of 80-95 rather than 0-100. 385 F. Supp. 551. We also remain concerned over the impact of the ratings on the 1973 sergeant roster, *i.e.*, among the top 514 written test scores 62 or 9.3% were blacks while only 31 or 6% of the top 514 roster candidates were black once the efficiency rating factor was applied. *Id.* While there was testimony critical of the method that ratings are assigned and changed (and there is a very serious question with respect to the ratings of Renault Robinson and other members of the Afro-American Patrolmen's League which we do not pass on here), the need for ongoing appraisal of an employee's performance is evident. Individual abuses of the system should not, we are convinced, result in its being declared illegal. This, we note, as the City defendants have, was the conclusion of the LEAA report. Accordingly, the preliminary injunction with respect to the use of efficiency ratings will be vacated and the plaintiffs will be denied relief in this regard.

We are constrained to say that, in our judgment, this conclusion about the use of efficiency ratings for purposes of promotion does not contradict our conclusion with respect to the lack of credibility which we accorded defendants' concurrent validity study of the 1973 sergeant examination. In the first place, the problem of credibility did not arise because the matched pair sergeants' efficiency ratings were used in the study. In the second place, subjective ratings such as these remain a

questionable criterion for test validation. 385 F. Supp. 559. The fact that we have now concluded that the subjective ratings have not been shown to be racially discriminatory does not enhance their value for test validation purposes.

For the reasons stated in our earlier memorandum as well as the foregoing, those portions of the preliminary injunction dealing with the appointment of sergeants from the 1973 sergeant roster and the 1973 sergeant examination will be made permanent except to the extent otherwise provided in the portion of this memorandum dealing with the appropriate remedy.

4. *Lieutenant promotions*

The questions relating to alleged discrimination in the promotion of lieutenants were not presented at the hearing on the preliminary injunction. The charges are, however, comparable to those made in respect to sergeant promotions: the 1970 written examination and the relevant efficiency ratings.

We need spend no additional time here with respect to the latter for we have just held that they were not discriminatory. For the following reasons, we reach the same conclusion with respect to the examination.

The examination was written by 1216 incumbent sergeants: 1090 (88.6%) were white, 119 (9.8%) were black and 7 (.6%) were Hispanic. This compared almost precisely with the 10% of all sergeants who were black or Hispanic. The gross pass rate was 866 (79.4%) white, 87 (73.1%) black and 6 (85.7%) Hispanic. The mix of passes was 90+% white, 9+% black and .6% Hispanic. These results do not, in our judgment, show such a disproportionate racial impact as to constitute a *prima facie* case under *Griggs, supra,* and *Albemarle, supra.*

But, plaintiffs urge, the superficial pass-mix rates are misleading. They point to the fact that as of March 10, 1975 only 12 of 276 or 4.3% of the lieutenants were black and only 1 was

Hispanic. Following the March 10 promotions 15 or 5.1% were black and still only 1 Hispanic. They go on to point out that of 85 promotions made from the 1970 list prior to March 10, only 5 or 6% were black and that of the next 47 men on the list (they representing the present number of vacancies in the rank of lieutenant) only 3 or 6% will be filled by black and Hispanic candidates. Thus they urge that if all of the vacancies are filled from the 1970 list there will be 339 lieutenants of which only 19 or 5.6% will be black and Hispanic.

Of course, the experts were called: Dr. Thelma Hunt for the plaintiffs, Dr. Pounian for the City defendants and Dr. John Wick of Northwestern University, by stipulation, for the McNamara defendants. Dr. Hunt insisted that the 1970 examination had an adverse racial impact; Drs. Pounian and Wick were just as insistent that it did not. Chi Square analyses, which show the probabilities that the pass-fail ratios were the result of chance as opposed to other factors, were computed by Dr. Hunt (1 to 8) and Dr. Pounian (1 to 5). Dr. Wick testified that neither was significant. Dr. Hunt's Chi Square ratio for promotions was 1 to 5; Dr. Pounian's 1 to 2. In Dr. Wick's judgment these computations were conclusive that there was no indication of racial impact.

Of course we are concerned with the low percentage of minorities in the high rank of lieutenant now and in the immediate future. But just as we have applied the burden of proof as we have perceived it to the patrol officer and sergeant situations, so, too, must we apply it here. In our judgment evidence that "the tests . . . select applicants for . . . promotion in a racial pattern significantly different from that of the pool of applicants" has not been shown here. *Albemarle Paper Co.* v. *Moody, supra.* Certain it is that the evidence is not as compelling as in the cases of the patrol officers and sergeants. We conclude that in the circumstances here presented, the burden of persuasion of discrimination remained with the plaintiffs and they have failed to carry it.

Accordingly, the plaintiffs will be denied any relief in respect to the promotion of lieutenants from the 1970 roster.

5. *Assignment of officers*

Beginning with some relatively uncontradicted testimony that through the 1950's the Department assigned virtually all black officers to black neighborhoods, and concluding with a statistical analysis using 1970 census data and current Department assignment data which continue to show racial imbalance in certain areas and units, the plaintiffs urge that racial discrimination in assignments persists.

The City defendants on the other hand, while not conceding the policy of the 1950's, argue that the present pattern of assignments does not warrant a finding of discrimination. Certainly a present explicit policy of racially oriented assignments has not been discovered. And so we are left to inferences. Here, the rationale of *Griggs* and its progeny is not applicable, and none of the parties contends otherwise.

A large part of police work is personal contact work. One of the social ills which comes from minority underrepresentation on this or any other police force is the image of the force, in the eyes of the minorities, as an instrument of the majority. The odds are overwhelming that the officer will be white, regardless of where the police-citizen contact occurs.

We could take judicial notice of the tensions that have existed between white officers and black citizens in predominantly black neighborhoods, but we need not do so for that was the thrust of a good portion of the testimony of the witnesses called by the Robinson plaintiffs. Indeed, one of the avowed purposes of the Afro-American Patrolmen's League is to relieve those tensions through, *inter alia,* the recruitment and employment of more black officers to serve and protect the black citizenry which is so desperately in need of that service and protection.

This is not to say that the City's Department can segregate its personnel along black neighborhood lines any more than the

City's housing authority can foster racially segregated public housing. It is to say, however, that in our judgment in the volatile area of police-community relations it is not *per se* unlawful for a metropolitan police department, within reasonable limits, to utilize its minority members in those areas where they are most needed. That is the pattern of use which we see from plaintiffs' evidence.

As in the case of the efficiency ratings, there was testimony showing abuses of the procedures attending transfers and reassignments. And here, as there, we do not pass now on the special claims of Robinson and the League with respect to assignment and transfer. But the assignment procedures of the entire Deparement should not be enjoined or subjected to continual judicial supervision because of those abuses which have not been shown to be widespread and racially motivated.

We conclude that while the shortages of blacks in certain areas are acute (the Area V Districts and CID have only 4% and 1.6% blacks respectively, and Area VI Districts and CID have only 3% and 1% blacks respectively), the districts, units and assignments within the Department do not show such overall disparity as to give rise to a finding of discrimination.

We do observe, however, that when the Department's overall black and Hispanic underrepresentation is overcome, the disparity here complained of should, we believe, solve itself.

For the foregoing reasons plaintiffs will be denied relief in respect to assignments.

6. *Discipline*

All of the plaintiffs, save Burauer, have made broad charges of racial discrimination in the Department's discipline system, and the Robinson plaintiffs have additionally complained of 150 separate instances of alleged retaliatory and discriminatory disciplinary proceedings. Having decided to render the foregoing portions of this decision now, we must defer the decision on discipline and the Robinson claims for a short time.

III. The Appropriate Remedies

Here we are concerned with two distinct subjects: the scope of immediate relief and the articulation of future hiring and promotion standards for the Department, and the consequences of our findings of sexual and racial discrimination on the City's revenue sharing entitlements. We will address them in that order.

A. *The scope of immediate relief and future hiring and promotion standards*

For the reasons previously stated, the preliminary injunction, which is reported at 385 F. Supp. 545-546, should be made permanent with respect to paragraphs 1 (including subparagraphs (a) through (c)), 2, 3, 4 and 6. Paragraph 5, dealing with efficiency ratings, should be and by this memorandum is dissolved.

The balance of the interim hiring agreement and order of December 16, 1974 must be performed promptly by the City defendants. Throughout this litigation there has been a constant representation to the court of the need for more police officers in the City. If this representation is true, the City defendants have been guilty of gross neglect of their duties. That, of course, is not our immediate concern. But the enforcement of the orders of this court is, even when the order has been entered upon the agreement of the parties. In April, 1975 when we were petitioned by the Camacho plaintiffs to enforce the agreed order in its entirety, we were urged by the City defendants not to do so because the results of the new method of selecting patrol officers were in the offing. It is now nine months later and still we wait. Accordingly, the City defendants will be ordered to proceed with the plan for the employment of police officers embodied in the December 16, 1974 order with the first class of 200 officers to be called for service within 60 days hereof and the balance within 30 days thereafter.

Furthermore, to alleviate any additional shortages of police officers, the City defendants will be authorized to continue to employe police officers from the 1971 patrolman roster and the 1972 police woman/matron roster, in accord with the ratios adopted in the December 16 order (100 black and Spanish surnamed males from the 1971 patrolman roster, 67 other males from that roster and 33 females from the police woman/matron roster), until the numbers of persons required to comply with these ratios has been exhausted.

Insofar as future hiring is concerned, we have concluded, albeit reluctantly, that some quota standard is needed. As we said in November, 1974, "It is far better in cases of this nature that the remedy come from the parties rather than the court." 385 F. Supp. 561. But we have despaired of such a voluntary remedy. The *in camera* submissions that have been made to us respecting the new methods of selecting patrol officers are so complex that should they fall short we will be back where we started some 18 months ago.

No court, state or federal, should become an employment review board. Our function should be to declare illegal that which we perceive to be illegal, enjoin it if necessary, and then set reasonable standards for those primarily responsible for the operation of the agency involved.

This is particularly true in a case such as this where the racial discrimination has been acute and over such a period of time as to create a large racial imbalance in the Department in relation to the available work force. It is most regrettable that the progress of the '60's was lost in less than 10 years. Hopefully the damage can be mended as quickly.

The problem is different insofar as a future remedy for women is concerned. Here we have virtually no prior experience with which to work. Even the statistics which might be drawn from the new methods of selection are not yet available.

In all of the circumstances we have concluded that a hiring standard of 16% females, 42% black and Spanish surname

males and 42% other males should be imposed on the Chicago Police Department until further order of the court.

In reaching this conclusion we are not without substantial support. Where an employer has engaged in a pattern or practice of unlawful discrimination, affirmative and mandatory relief is required to ensure full enjoyment of the right to equal employment opportunity. 42 U. S. C. § 2000e–6(a). In such cases, the court has not only the power but the duty both to enjoin future discrimination and as far as possible to require the elimination of the continuing effects of past discrimination. *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F. 2d 622 (2d Cir. 1974). *United States* v. *Local 169, Carpenters*, 457 F. 2d 210, 216 (7th Cir. 1972), *cert. denied*, 409 U. S. 851, 93 S. Ct. 63, 34 L. Ed. 2d 94 (1972); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), *cert. denied*, 404 U. S. 984, 92 S. Ct. 447, 30 L. Ed. 2d 367 (1971); *Morrow* v. *Crisler*, 491 F. 2d 1053 (5th Cir. 1974) *(en banc)*; *United States* v. *IBEW Local 212*, 472 F. 2d 634 (6th Cir. 1973); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971) *(en banc)*, *cert. denied*, 406 U. S. 950, 92 S. Ct. 2045, 32 L. Ed. 2d 338 (1972); *United States* v. *Local 46, Lathers*, 471 F. 2d 408 (2d Cir. 1973). The necessity for affirmative relief is not eliminated by the fact that an employer has taken some initial steps toward the elimination of discrimination. *United States* v. *Local 520 Operating Engineers*, 476 F. 2d 1201 (7th Cir. 1973); *United States* v. *IBEW Local 38*, 428 F. 2d 144 (6th Cir. 1970), *cert. denied*, 400 U. S. 943, 91 S. Ct. 245, 27 L. Ed. 2d 248 (1970).

Relief imposing numerical goals and ordering accelerated hiring of minority persons from among qualified applicants is both constitutional and appropriate to make up for the effects of an employer's discriminatory practices, especially where such relief is necessary to the achievement of prompt and substantial change in the racial and ethnic makeup of the employer's work force. *NAACP* v. *Allen*, 493 F. 2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F. 2d 1053 (5th Cir. 1974) *(en banc)*; *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971) *(en banc)*, *cert. denied*, 406 U. S. 950, 92 S. Ct. 2045, 32 L. Ed. 2d 338 (1972); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), *cert. denied*, 404 U. S. 984, 92 S. Ct. 447, 30 L. Ed. 2d 367 (1971); *United States* v. *IBEW Local 212*, 472 F. 2d 634 (6th Cir. 1973); *Boston Chapter, NAACP and United States* v. *City of Boston*, 371 F. Supp. 507 (D. Mass. 1974); *see also Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F. 2d 680 (7th Cir. 1972); *Pennsylvania* v. *Sec'y of Labor*, 442 F. 2d 159 (3d Cir. 1971), *cert. denied*, 404 U. S. 854, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971).

We have reached a like conclusion with respect to the promotion of sergeants. Here there is no new method of selection in the offing. But the Department will need middle level supervisors, although some of those needs have undoubtedly been met by the temporary sergeants program.

The goal is a sergeant mix reasonably representative of the patrol force, the minority and female percentages of which will begin to increase under the provisions of the decree relating to patrol officers. We start, of course, with virtually no available women. In these circumstances a promotion standard of 40% black and Spanish surname males and 60% other males is reasonable. These candidates may be selected from the 1973 sergeant roster, as the Arado defendants urge, until new selection methods are developed.

The Government seeks back pay under 42 U. S. C. § 2000e–5(g) for those who have been injured by the City defendants' discriminatory hiring and promotion practices. As we read *Albemarle Paper Co.* v. *Moody*, *supra*, such an award is to be made unless there are reasons for denying it "which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U. S. at 421, 95 S. Ct. at 2373, 45 L. Ed. 2d at 299. The City defendants have not asserted the existence

of such reasons. Indeed, in their post trial brief, which was filed subsequent to the decision in *Albemarle*, they advanced no reasons in opposition to a back pay award. Accordingly, the decree should provide for such an award to be sought by the Government.

The Burauer plaintiffs earlier requested that they be certified as the representatives of a class of women who have been denied employment by the Chicago Police Department. We denied that request upon the ground that the Government will adequately represent those injured by the City defendants' misconduct.

The Camacho plaintiffs have a similar motion pending which, we confess, we overlooked in the paper chase this case has been. For that we ask counsel's indulgence.

For similar reasons the Camacho motion to certify a class should be denied. In view of the Government's willingness to prosecute the claims of all injured persons, it cannot be said that either a Burauer or Camacho class would be "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), *Fed. R. Civ. P.*

It is clear, however, that the Burauer and Camacho plaintiffs may personally press their individual claims, or they may assert them through the Government. It is also clear that their counsel are entitled to attorneys fees under 42 U. S. C. § 2000e–5(k). Fees for counsel for the Robinson plaintiffs, on the other hand, should await the decision of the Robinson claims.

B. *Revenue Sharing*

In brief compass the recent record of the Police Department of the City of Chicago in the area of sexual and racial discrimination in employment and promotion is this.

In the mid 1960's the overall racial profile of the Department reflected the City which it served, at least insofar as total employment was concerned. Beginning in the late '60s that profile became severely distorted to the end that today the Department,

which serves a community that is 40% black and Hispanic, is only 17% black and Hispanic. The City has offered no explanation for this radical change. The Arado defendants have suggested that the black discontent and riots of the late '60s so disenchanted black males as to cause them to reject police work as a vocation. But as we have seen, that argument just does not withstand analysis. Indeed, were we to regard the riots of the late '60s as a relevant circumstance we would be inclined to conclude that they triggered an anti-black animus which contributed to the low recruitment of black patrol officers. That, as we understand it, is the position of the Robinson plaintiffs whose particularized claims we will decide shortly. Now we only observe that there is evidence which supports that thesis; there is also evidence which contradicts it.

It is undisputed, however, that in 1968 the Department gave a sergeant promotion examination the results of which were clearly discriminatory; in 1970 it gave a patrolman examination with the same results; in 1971 another discriminatory patrolman examination and in 1973 another discriminatory sergeant examination. It is also undisputed that in 1972 the Law Enforcement Assistance Administration of the Department of Justice reported the results of a study to the command of the Police Department. That study showed severe racial imbalance in the Department. The Superintendent of the Department at the time of the report regarded it as a "numbers game" which was of "no concern" to him. His successor, as of the taking of his deposition in this action, had not read the report since assuming his command but he knew he disagreed with its conclusions.

Throughout this period the equal protection clause of the Fourteenth Amendment and 42 U. S. C. § 1981 were applicable to the City's Police Department and on March 24, 1972 the Equal Employment Opportunity Act of 1972 made Title VII of the Civil Rights Act of 1964 applicable to it. Whether the equal protection clause prohibited discrimination in a police

department on the basis of sex is a question we need not decide. It is clear that the Civil Rights Act of 1964 does and that during the 30 months which intervened between the March 1972 effective date of the Act and the entry of the preliminary injunction here, the City defendants did virtually nothing to end the discrimination against women in the Police Department. Furthermore, the record here, as previously recited, shows that the Department has done virtually nothing in that regard since the preliminary injunction.

On October 20, 1972 the Fiscal Assistance to State and Local Government Act became effective. 31 U. S. C. § 1221 *et seq.* Its philosophy is to return to state and local governments a portion of the individual federal income taxes paid by the inhabitants of the territory governed by the state and local government. Included in the permitted uses to which such funds may be put is "public safety (including law enforcement . . .)." 31 U. S. C. § 1222(a)(1)(A). The federal appropriations expire at the end of the period beginning July 1, 1976 and ending December 31, 1976.

The funds are payable to the state and local governments almost as a matter of right on a quarterly basis. All that is required of the governmental recipient of the funds is a brief statement showing that the funds will be used in accord with the very broad guidelines of 31 U. S. C. § 1222, which, as we have seen, include public safety and law enforcement.

Section 122(a) of the Act provides, however, that

> No person . . . shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under subchapter I of this chapter.

31 U. S. C. § 1242(a).

During the years 1972, 1973 and 1974, the City of Chicago received more than $135,000,000 which were used to finance its Police Department. Already under the obligations of the

Constitution and applicable Civil Rights Act, the City accepted the funds under the obligations of the Fiscal Assistance to State and Local Governments Act.

On December 18, 1974 the District Court for the District of Columbia enjoined the ORS defendants from making further revenue sharing payments to the City until, *inter alia*, the City was subject to a final order here, had agreed to comply with the order and had in fact complied with the order. Upon transfer of the District of Columbia case here, we adopted that injunction and refused to modify or vacate it. 395 F. Supp. 329. Our reasons for that decision have been fully recited and need not be repeated here. On November 13, 1975 we again refused to modify the injunction. We now conclude that it should be made permanent to the end that the ORS defendants are enjoined from making revenue sharing payments to the City until the City has complied with the decree entered pursuant to this decision.

The legal bases for this conclusion have been previously stated. 395 F. Supp. 329. They are presently before the Court of Appeals and we shall not elaborate upon them at this time.

What remains here is the exercise of our discretion to make the order permanent, in the full realization that $76,000,000 (and by this date perhaps $95,000,000) have been impounded. We have done so for the following reasons.

The evidence shows that the City defendants have knowingly engaged in racial and sexual discrimination in employment and promotion within the Chicago Police Department. Accordingly, they have knowingly violated the equal protection clause of the Fourteenth Amendment, applicable Civil Rights Acts and the Fiscal Assistance to State and Local Governments Act.

The evidence shows that throughout the relevant time period, *i.e.*, since October 20, 1972, the City defendants have done virtually nothing to alleviate the effects of their discrimination.

The City defendants take the position that they are entitled to the revenue sharing funds as a matter of right, overlooking

the plain mandate of the Act and the fact that the moneys which flow under the Act have as their origin the federal personal income tax payments from the inhabitants of the City, 40% of whom are black and Hispanic and 50% of whom are women, the victims of their discriminatory conduct.

The funds will not be lost. They have been impounded and are available to the City whenever it brings itself into compliance with the requirements of law. What is obvious, however, is that the City demands the funds before it complies with the law.

That is also what the *amici curiae* urged when they, uninformed as to the record, appeared here in support of the City's motion to modify: a pay now, performance later philosophy. We cannot accept that. We are firm in our conclusion that the most effective remedy to end the sexual and racial discrimination we have found to exist with the Chicago Police Department is the economic sanction which we have chosen.

There is, of course, the question of whether the ORS defendants need be enjoined. Their counsel, the Department of Justice, suggests that such judicial restraint on the executive branch of government is uncalled for. We rejected those same arguments in April 1975 and we reject them again. The ORS defendants' actions have been ambiguous and faltering. It is quite unclear to us what their position is in the matter. We know they have withheld payments to the City in compliance with the orders of the District of Columbia court and this court. But it is not clear that they would continue to withhold those payments should the injunction be dissolved.

This is particularly so in light of the ambiguous stance the Department of Justice has taken in this litigation. When the Government's complaint was amended in May, 1974 to claim under 31 U. S. C. § 1242(a) and (c), we understood one of the issues in the case would be the repayment (we have called it "recapture") of funds previously used unlawfully by the City's Police Department. The Secretary has adopted a regulation

authorizing referral of claims for repayment to the Attorney General "for an appropriate civil action to require repayment" if relief for prior violations cannot be obtained by downward adjustment in future payments. 31 C. F. R. § 51.32(f)(v). And Section 122(c) itself authorizes an action by the Attorney General "for such relief as may be appropriate." 31 U. S. C. § 1242(c).

But the Government has not sought repayment. Neither its pretrial briefs, post trial brief nor proposed decree make any reference to the subject. Of course we recognize that the Secretary and the Attorney General are vested with great discretion in such matters. So much so that we deny the Robinson plaintiff's prayer in 75 C. 79 for an injunction which would compel the ORS defendants to seek repayment. But we are at a loss as to the future plans of the Government in this regard. Does it intend to make downward adjustments in future payments? Does it intend to withhold entirely future payments? Does it intend to forego entirely any claim for repayment?

The past is history and we leave to those responsible for the administration of the revenue sharing program the decision as to what should be done respecting past payments. But payment of the moneys presently impounded will continue to be restrained and future payments of revenue sharing moneys to the City of Chicago will be enjoined until further order of court.

The parties are directed to prepare a decree in accord with the foregoing and present it by January 14, 1976.

SUPPLEMENTAL MEMORANDUM

When, on January 14, the several parties presented their suggestions in respect to the decree to be entered herein, the City defendants questioned our jurisdiction to proceed in light of the interlocutory appeal pending in the Court of Appeals for this Circuit. We requested authorities from the parties which have been presented and given our close attention. In addition,

we deferred entry of the decree for a reasonable period of time to afford the defendants the opportunity to seek prohibitory relief against us in the Court of Appeals should they wish to do so. No action has been taken by the City defendants in the latter regard and our reexamination of the authorities which speak to jurisdiction persuades us that we were correct in our conclusion stated in our memorandum decision of January 5, that jurisdiction is here to proceed on the merits despite the pendency of the interlocutory appeal.

Pursuant to 28 U. S. C. § 1292(a)(1) (1970), the courts of appeals have jurisdiction of appeals from interlocutory orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. Unlike Section 1292(b) which authorizes interlocutory review of certified questions, Section 1292(a)(1) does not affirmatively state that the proceedings in the district court are stayed pending appeal. Rule 62(a), *Fed. R. Civ. P.*, does provide that "unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal." Furthermore, pursuant to the provisions of Rule 62(g) and *Fed. R. App. P.* 8(a) a party may seek a stay of proceedings in the district court pending an appeal. No stay was, to our knowledge, sought here.

The decisions universally hold that absent a stay order, an appeal from an interlocutory order pursuant to Section 129-(a)(1) does not divest the district court of jurisdiction to proceed with the merits of the cause.

The seminal case is *Ex parte National Enameling & Stamping Co.* 201 U. S. 156, 26 S. Ct. 404, 50 L. Ed. 707 (1906), involving a forerunner of Section 1292(a). (Act of March 3, 1891, § 7, 26 Stat. 828, *as amended*, 28 Stat. 661, 31 (Stat. 660.) The Court held that while the statute allowed an appeal from an interlocutory order or decree granting or continuing an injunction, other proceedings in the district court were not

stayed. "It was not intended that the cause as a whole be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specifically ordered." 201 U. S. at 161-62, 26 S. Ct. at 406, 50 L. Ed. at 708.

More recently, a number of courts of appeals have held, "an appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits." 9 J. Moore, *Federal Practice* ¶ 203.11, at 739 (2d ed. 1975). Thus in *Janousek* v. *Doyle*, 313 F. 2d 916, 920-22 (8th Cir. 1963), the court held that an appeal from a denial of a preliminary injunction did not divest the district court of jurisdiction to dismiss the case when the plaintiff failed to appear for trial. Moreover, the court held that if the district court's order of dismissal was correct, the appeal from the denial of the preliminary injunction would be moot. Similar conclusions have been reached by other courts. *See, e.g., DePinto* v. *Provident Security Life Ins. Co.* 374 F. 2d 50 (9th Cir. 1967); *Nalco Chemical Co.* v. *Hall*, 347 F. 2d 90 (5th Cir. 1965); *United States* v. *Lynd*, 321 F. 2d 26 (5th Cir. 1963), *cert. denied*, 375 U. S. 968, 84 S. Ct. 486, 11 L. Ed. 2d 416 (1963); *S. E. C.* v. *Okion*, 137 F. 2d 862 (2d Cir. 1943).

In conclusion, the City defendants' appeal of the order denying their request to modify the preliminary injunction impounding revenue sharing funds did not divest us of jurisdiction to proceed with a decision on the merits, absent a stay order issued by the Court of Appeals.

Nor do *Chicago Housing Tenants Organization, Inc.* v. *CHA*, 512 F. 2d 19 (7th Cir. 1975); *Grand Opera Co.* v. *20th Century-Fox Film Corp.*, 235 F. 2d 303 (7th Cir. 1956), and *Lloyd* v. *Lawrence*, 60 F. R. D. 116 (S. D. Tex. 1973), relied upon by the City defendants, suggest let alone require a different result. *Grand Opera* and *Lloyd* both involved questions co-

cerning the jurisdiction of the district court while an appeal was pending from a final judgment on the merits. *Chicago Housing Tenants Organization,* on the other hand, strongly suggests the very conclusion we have reached here. 512 F. 2d at 22.

Accordingly, a final decree has been entered this date in accord with the Memorandum Decision of January 5, 1976.

FINAL DECREE GRANTING PERMANENT INJUNCTION AND OTHER RELIEF PURSUANT TO RULES 52(a), 54(b) AND 65(d) FED. R. CIV. P.

These consolidated cases have been tried on the merits pursuant to Rule 65(a)(2), *Fed. R. Civ. P.* The Court has considered all of the evidence presented by all of the parties at all of the evidentiary hearings held herein and has considered all of the oral and written arguments advanced by counsel for all of the parties. The Court finds and concludes that it has jurisdiction of the parties hereto and the subject matter hereof and that it has been fully advised in the premises. The Court has heretofore rendered its Memorandum Decision of January 5, 1976 and its earlier Memorandum Decisions of April 24, 1974, November 7, 1974 and April 21, 1975, all of which are incorporated herein, as its findings of fact, conclusions of law and the reasons for granting the injunction described herein, pursuant to Rules 52(a) and 65(d), *Fed R. Civ. P.* Although this decree disposes of fewer than all of the claims of the parties, the Court finds that there is no just reason to delay the entry of this decree, its enforcement or any appeal taken herefrom and, accordingly, pursuant to Rule 54(b), *Fed. R. Civ. P.*, expressly directs the Clerk of this Court to enter this decree as a final judgment in respect to the claims of the parties adjudicated herein.

NOW THEREUPON IT IS ORDERED, ADJUDGED AND DECREED:

I.

Selection, Appointment, Assignment and Promotion of Police Officers for and within the Chicago Police Department

1. The defendants City of Chicago, James M. Rochford, Superintendent, Chicago Police Department, William E. Cahill, Reginald Dubois, Quentin J. Goodwin, Commissioners, Chicago Civil Service Commission, Charles A. Pounian, Secretary, Chicago Civil Service Commission, James B. Conlisk, Marlin W. Johnson, Wilbur Daniel, Paul W. Goodrich, Lewis F. Peick and Sebastian Rivera, Chicago Police Board, (hereafter sometimes referred to as "Chicago defendants") and their officers, agents, servants, employees and all persons and organizations in active concert or participation with them are permanently enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any employee of, or any applicant or potential applicant for employment with the Chicago Police Department because of such individual's sex, race, color, or national origin, and specifically from:

(a) Failing or refusing to recruit, hire and promote for and within the Chicago Police Department black and Spanish-surnamed persons on an equal basis with white persons of non-Spanish origin;

(b) Failing or refusing to recruit, hire and promote for and within the Chicago Police Department women on an equal basis with men;

(c) Using any qualifications, tests, standards or procedures for purpose of recruiting, hiring, assigning or promoting persons for or within the Chicago Police Department which are not validated as job-related and which exclude blacks, Spanish-surnamed persons or women from employment opportunities in the Chicago Police Department in ratious [*sic*] disproportionate with the exclusion of white males of non-Spanish origin.

2. The Chicago defendants shall make no further certifications for appointment to the rank of Patrolman in the Chicago Police Department from the eligibility list based on the 1971 Patrolman's Examination, except as provided herein in paragraphs 6 and 7 and they shall not administer or utilize police entrance examinations of the type administered in 1971 as the Patrolman's Examination.

3. The Chicago defendants shall make no further use of a background investigation or the results thereof as a standard of appointment to the rank of Patrolman in the Chicago Police Department unless objective criteria are established for such background investigation and they are validated as job-related or shown to have no adverse racial impact; provided, however, that nothing herein shall prohibit the Chicago defendants from disqualifying a person from appointment to the Chicago Police Department because of such person's prior conviction of a serious criminal offense.

4. The Chicago defendants shall make no further certifications for promotion to the rank of sergeant in the Chicago Police Department from the current eligibility list based on the 1973 Sergeant's Examination, except as provided herein in paragraph 9 and they shall not hereafter administer or utilize sergeant promotion examinations of the type administered in 1973.

5. The Chicago defendants shall discontinue the classification Patrolman in the Chicago Police Department and the classification Patrol Officer (or some similar term) shall be substituted therefor, and women shall be recruited, hired, assigned and promoted to positions in the Chicago Police Department in accordance with the same standards and procedures and on an equal basis with men. The Chicago defendants shall, within 30 days of the entry of this decree, offer to incumbent police women and police matrons an opportunity to transfer to other police officer work for which they are qualified (such qualifications to

be determined in accord with the provisions of this decree) and they shall be so transferred as soon as such work is available.

6. The balance of the Interim Hiring Agreement and Order approved and entered by this Court on December 16, 1974 shall be performed by the Chicago defendants. Approximately 400 applicants shall be certified by said defendants to the Chicago Police Department Training Academy in two groups of 200 each for inclusion in training classes to commence on or about March 5, 1976 and April 5, 1976. For each training class of approximately 200, the ratio of black and Spanish-surnamed males, females and other males will be as follows:

(a) 100 positions will be filled by black and Spanish-surnamed males from the eligibility list based on the 1971 Patrolman's Examination;

(b) 33 positions will be filled by females from the eligibility listed based on the 1972 Policewoman/Matron's Examination;

(c) 67 positions will be filled by other males from the eligibility list based on the 1971 Patrolman's Examination. Selection and certification of police officers pursuant to this paragraph and paragraph 7 hereof shall, in all respects, be in accordance with the procedures of this order and the December 16, 1974 Interim Hiring Order and appendices thereto, and said order and its appendices are incorporated herein by reference.

7. To alleviate any additional shortages of police officers, the Chicago defendants are authorized, upon compliance with paragraph 6 above, to continue to employ police officers in rank order from among those remaining on the eligibility lists based on the 1971 Patrolman's Examination and the 1972 Policewoman/Matron's Examination, in accordance with the ratios adopted in the Interim Hiring Order of December 16, 1974 and set forth in paragraph 6 above, until the number of persons in any of the three classes (black and Spanish-surnamed males, other males, or females) available to comply with those ratios has been exhausted.

8. In order to remedy the present effects of the Chicago defendants' past discriminatory hiring and promotion practices and procedures, the following affirmative steps are ordered:

(a) Defendants shall as a long term goal seek to recruit and appoint as police officers in the Chicago Police Department qualified black, Spanish-surnamed persons and females in sufficient numbers so as to increase substantially the minority composition of the Chicago Police Department so that it more nearly reflects the racial and ethnic composition of the work force of the City of Chicago as a whole, and to recruit and hire women in sufficient numbers so as to provide equal employment opportunities for women in the Chicago Police Department.

(b) To insure as quickly as practicable the attainment of the above long-term goal, after present vacancies are filled in accordance with paragraphs 6 and 7 above, the Chicago defendants shall, subject to the availability of qualified black, Spanish-surnamed and female applicants, appoint at least 16 per cent females and 42 per cent black and Spanish-surnamed males to all future police officer vacancies in the Chicago Police Department, until further order of the Court. So long as they comply with this requirement of this decree, the Chicago defendants are authorized to appoint, at their election, but in rank order, persons who remain on the eligibility lists based upon the 1971 Patrolman's Examination and the 1972 Policewoman/Matron's Examination after compliance with paragraphs 6 and 7 above.

(c) The Chicago defendants shall consider for appointment as police officers in the Chicago Police Department all persons who meet the existing age and residency requirements, the physical standards and medical examination requirements set forth in the Partial Consent Decree entered on June 28, 1974 in *Camacho* v. *City of Chicago, et al.*, No. 73 C 1252.

(d) All persons who passed the 1971 Patrolman's Examination, who were disqualified as a result of the Civil Service Commission medical and physical examination and who have not been re-examined in accordance with the procedures set

forth in the Partial Consent Decree in *Camacho* v. *City of Chicago*, shall be promptly notified by the Chicago defendants at their last known address by certified mail, return receipt requested, or by such other reasonable means as are likely to result in actual notice to them of the opportunity to be re-examined in accordance with the procedures set forth in the Partial Consent Decree entered on June 28, 1974 in *Camacho* v. *City of Chicago*. The Chicago defendants shall submit to the Court and to counsel for plaintiffs, not later than June 1, 1976, a report identifying all persons who were so re-examined, identifying those who passed and those who failed. Upon appropriate motion, the Court will rule upon the rights of those who are successful.

(e) All persons who passed the 1971 Patrolman's Examination, who were disqualified as a result of the subsequent background investigation shall be promptly notified by the Chicago defendants at their last known address, return receipt requested, or by such other means as are likely to result in actual notice to them of the opportunity to undergo any new background investigation developed by the Chicago defendants in accord with the provisions of paragraph 3 above. The Chicago defendants shall submit to the Court and to counsel for plaintiffs, no later than 60 days after the development of new background investigation standards and procedures, a report identifying all such persons who qualify under such new background investigation standards and procedures. Upon appropriate motion, the Court will rule upon the rights of such persons.

(f) The Chicago defendants shall comply in all respects with those provisions of Parts II and IV of the Order Regarding Selection Procedures, entered April 17, 1975, which are concerned with the selection of patrol officers for the Chicago Police Department.

9. In order to remedy the present effects of the Chicago defendants' past discriminatory practices and procedures for promotion to sergeant, the following affirmative steps are ordered:

(a) The Chicago defendants shall adopt and seek to achieve a goal of promoting blacks, Spanish-surnamed persons and females to the rank of sergeant so as to have and maintain a sergeant mix reasonably representative of the patrol force, the minority and female percentages of which will begin to increase under the provisions of this decree relating to the appointment of patrol officers.

(b) To ensure as quickly as practicable the attainment of this goal, 40% of the promotions to the rank of sergeant shall consist of black and Spanish-surnamed persons, subject to the availability of qualified applicants, until further order of the Court. The Chicago defendants are authorized to utilize, in rank order, the eligibility list based on the results of the 1973 Sergeant's Examination for the selection of such persons until other selection methods are developed or until the number of black and Spanish-surnamed persons on that eligibility list has been exhausted. In complying with this requirement of this decree, the Chicago defendants are authorized to make permanent the temporary promotions to the rank of sergeant which were made pursuant to Part III of the Court's Order Regarding Selection Procedures entered April 17, 1975, or to remove those persons so temporarily appointed and to fill the vacancies so created in the rank of sergeant from the eligibility list based on the results of the 1973 Sergeant's Examination in accord with the terms of this paragraph; provided, however, that if said temporary promotions are made permanent, the next succeeding group of persons promoted to the rank of sergeant shall consist of a sufficient number of black and Spanish-surnamed persons as to make that group together with the group of temporary sergeants made permanent, 40% black and Spanish surnamed.

(c) An appropriate goal for promotion of females to the rank of sergeant will be considered, upon appr[illegible]iate motion when a sufficient number of females are available [illegible]e patrol officer rank.

10. The Chicago defendants are authorized to promote to the rank of lieutenant those persons on the eligibility list based upon the 1970 Lieutenant's Examination.

11. Until further order of this Court, the Chicago defendants shall file with the Court and serve copies on counsel for plaintiffs, the following:

(a) On or prior to the last day of any month in which the Chicago defendants certify for training or offer positions as patrol officers to any persons pursuant to the provisions of paragraphs 7 and 8 above, or promote any persons to the position of sergeant pursuant to the provisions of paragraph 9 above, a list of the persons so certified, appointed, or promoted which shall show the name, current address, race, sex and position on any eligibility list of all such persons.

(b) On or prior to the last day of any month in which any new group of persons certified for training classes as patrol officers complete such training class, the Chicago defendants shall file with the Court, and serve on counsel for the plaintiffs, a report indicating whether each trainee, by name, was successful or unsuccessful in completing the training course and an explanation shall accompany such report setting forth the reasons for the discharge of any trainee.

(c) Upon acceptance of those persons who successfully complete the training period as probationary patrol officers, the Chicago defendants shall report, in the quarterly report required pursuant to the provisions of paragraph 11-(d) below, indicating the total number of probationary patrol officers who complete the probationary period, and for each probationary patrol officer who is dismissed or no longer a probationary officer, the reasons therefor.

(d) Within 30 days of the date of entry of this decree, and thereafter within 30 days of the last day of the months of June, September, December and March, a report or computer printout (with appropriate code descriptions) identifying all sworn mem-

bers of the Chicago Police Department by name, rank, race, sex and social security number for each unit of the Department, and (except for the first report) identifying all such persons who were either appointed or promoted during the quarterly reporting period together with their appointment or promotion date, and identifying those who during the quarterly reporting period left the employment of the Department and the reasons therefor.

12. In accord with the purposes of Title VII of the Civil Rights Act of 1964, as amended, to make whole by an award of back pay to all identified victims of the Chicago defendants' unlawful discriminatory employment practices and, to the extent appropriate, to order retroactive seniority adjustments for all identified victims of the Chicago defendants' unlawful discriminatory promotion practices, the plaintiff United States of America is directed to proceed to undertake such discovery as is necessary to seek such awards and adjustments and to report to the Court on the progress thereof within 60 days of the entry of this decree. Absent an agreement among the parties to the amount of awards and adjustments to be made to identified members of the affected classes, ancillary proceedings will be instituted in respect thereto. The individual plaintiffs in the action brought by Tadeo Robert Camacho, 73 C 1252, and the individual female plaintiffs who intervened with Carolyn Burauer may, if they elect, present individual petitions for awards of back pay.

13. The motion of Tadeo Robert Camacho, et al., plaintiffs in No. 73 C 1252, for certification of a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, filed March 27, 1974, is hereby denied, without prejudice to the rights of the members of that alleged class to participate in the back pay and seniority awards and adjustments contemplated by paragraph 12 hereof.

14. Attorneys for Carolyn Burauer, et al. and Tadeo Robert Camacho, et al. may present appropriate petitions for reimbursements of expenses and attorneys fees to be awarded to them for services rendered to date. Such petitions shall be filed within 30 days and shall specify the parties against whom the petitioners believe such costs and fees should be assessed and any defendant or intervening defendant who desires to do so may answer such petitions within 30 days thereafter. Petitions for attorneys fees for future services will be entertained as appropriate.

II.

Revenue Sharing

15. The defendants in No. 75 C 79, William E. Simon, Secretary of the Treasury, Graham W. Watt, Director of the Office of Revenue Sharing, William H. Sager, Chief Counsel, Office of Revenue Sharing, and Robert T. Murphy, Compliance Manager, Office of Revenue Sharing (hereafter "ORS defendants") and their officers, agents, servants, employees and all persons and organizations in active concert or participation with them are enjoined from making any further payments of federal revenue sharing funds to the City of Chicago pursuant to the State and Local Fiscal Assistance Act of 1972, 31 U. S. C. A. § 1221, *et seq.*, until further order of this Court.

16 The ORS defendants shall monitor the activities of the Chicago defendants to determine their compliance with this order and with the non-discrimination requirements of the State and Local Fiscal Assistance Act of 1972 and, commencing March 31, 1976, shall file with this Court and serve upon all counsel of record, quarterly reports analyzing the progress toward compliance made by the Chicago defendants and any indication or evidence found of non-compliance with the requirements of the Act or of this decree.

17. Within 30 days of the entry of this decree, all of the parties shall submit to the Court a proposed plan and timetable for the release of all or portions of the Revenue Sharing entitlements due to the City of Chicago. The plan shall propose a

timetable for and the extent to which the Chicago defendants must comply with the requirements of this decree in order to obtain a release of some or all of the Revenue Sharing entitlements due to the City of Chicago. The plan shall also include a specific statement by the ORS defendants as to their intent respecting past Revenue Sharing payments made to the City of Chicago.

18 The plaintiffs' request in No. 75 C 79 for an injunction compelling the ORS defendants to seek repayment of funds previously paid to the City of Chicago pursuant to the State and Local Fiscal Assistance Act of 1972 is hereby denied.

III.

Miscellaneous

19. The Court retains jurisdiction of this cause to enforce this order, for determination of any related matter, for the entry of other orders as provided in this decree, and for any other appropriate purposes including the adjudication of those issues reserved in the Court's Memorandum Decision of January 5, 1976.

20. This decree shall remain in effect until further order of this Court.

Nos. 76-1380 and 76-1390

Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS ARADO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RAYMOND T. ADAMS, ET AL., PETITIONERS

v.

CITY OF CHICAGO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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DREW S. DAYS, III,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1380

LOUIS ARADO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 76-1390

RAYMOND T. ADAMS, ET AL., PETITIONERS

v.

CITY OF CHICAGO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Arado Pet. App. A1-A61;[1] Adams Pet. App. 1-61)[2] is reported at 549 F. 2d 415. The final opinion and order of the district court (Arado Supp. Pet. App. A99-A158)[3] are reported at 411 F. Supp.

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[1] "Arado Pet. App." refers to the appendix to the petition in No. 76-1380.

[2] "Adams Pet. App." refers to the appendix to the petition in No. 76-1390.

[3] "Arado Supp. Pet. App." refers to the "Supplementary Appendix" to the petition in No. 76-1380.

218. The opinion of the district court on the preliminary injunction is reported at 385 F. Supp. 543. Later orders of the court of appeals (Adams Pet. App. 63-68) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1977. A petition for a writ of certiorari was filed in No. 76-1380 on April 8, 1977, and in No. 76-1390 on April 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly held that use of a promotional examination for the position of sergeant in the Chicago Police Department that had a disparate impact on minority applicants and was not shown to be a reliable indicator of job performance violated Title VII of the Civil Rights Act of 1964.

2. Whether a remedial order requiring the City of Chicago to attempt to achieve long-term goals by meeting short-term requirements for the promotion of qualified blacks, Spanish-surnamed persons, and women to the rank of sergeant is an appropriate remedy under Title VII.

3. Whether the court of appeals erred in denying untimely petitions for intervention for the purpose of seeking review of portions of its decision on relief.

STATEMENT

The United States initated this suit on August 14, 1973, pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253 *et seq.*, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.*,[4] against the City of Chicago, the Chicago

[4]The complaint also alleged violations of the Fourteenth Amendment; 42 U.S.C. 1981 and 1983; the nondiscrimination provision of the State and Local Fiscal Assistance Act of 1972, 86 Stat. 932, 31 U.S.C. (Supp. V) 1242, as amended by Pub. L. 94-488, 90 Stat. 2350, 2354; and regulations and guidelines of the Department of Justice and the Law Enforcement Assistance Administration, 28 C.F.R. 42.201 *et seq.*, subpart D, and 28 C.F.R. 42.301 *et seq.*, subpart E.

Civil Service Commission, and the Superintendent of Police, alleging a pattern or practice of discrimination against blacks, Hispanics, and women in hiring, assignment, promotion, and discipline within the Chicago Police Department.[5]

The United States sought a preliminary injunction and in a Memorandum Opinion, dated November 7, 1974, the district court held that the United States had established a *prima facie* case of discrimination based upon the racially disproportionate impact of the testing procedure used to make appointments to the position of sergeant[6] and that the defendants failed to prove that the 1973 examination had a demonstrable relationship to successful performance as a sergeant (385 F. Supp. at 560). Further promotion from eligibility rosters based upon the 1973 examination were enjoined. Because there was apparently a serious shortage of supervisory personnel, however, the district court subsequently allowed the City to appoint 175 patrolmen to positions as temporary sergeants.[7]

[5]The suit was consolidated with two other pending suits by black and Hispanic persons challenging the employment practices of the police department. Other aspects of the procedural history of the case are cited in the opinion of the court of appeals (Arado Pet. App. A1-A7).

[6]The district court made limited findings as to the 1968 sergeant's examination. While blacks constituted 19.1 percent of the persons taking that examination, only 10 percent of the persons promoted on the basis of that test were black. 385 F. Supp. at 550. The district court also found that the procedure used for hiring patrolmen, including a written examination and background investigation, had a racially disproportionate effect and was not shown to be valid under Title VII and that the police department had discriminated against women in hiring. 385 F. Supp. at 555-557.

That decision was upheld in an interlocutory appeal taken by the Arado intervenors (Petitioners in No. 76-1380), a group of incumbent patrolmen who held top positions on the 1973 eligibility list for promotion to sergeant.

Trial on the merits began on March 10, 1975. In its memorandum decision (January 5, 1976; Arado Supp. Pet. App. A99-A145) the district court reaffirmed its findings made in support of the preliminary injunction, and in its final decree (February 2, 1976) permanently enjoined the use of the eligibility list based on the 1973 sergeant's examination (Arado Supp. Pet. App. A150). In order to remedy the present effects of the past discrimination, the court ordered the City defendants to "adopt and seek to achieve a goal of promoting blacks, Spanish-surnamed persons and females to the rank of sergeant so as to have and maintain a sergeant mix reasonably representative of the patrol force" (Arado Supp. Pet. App. A154). The court also ordered that (*ibid.*):

> To insure as quickly as practicable the attainment of this goal, 40% of the promotions to the rank of sergeant shall consist of black and Spanish-surnamed persons, subject to the availability of qualified applicants, until further order of the court.

Finally, the district court authorized the City defendants to make the 175 temporary appointments permanent (Arado Supp. Pet. App. A154).

The court of appeals "on an independent review of the record" affirmed. "We find the court's factual findings to be supported by substantial evidence and hold that the disparity produced by the combination of these components is enough to establish [an unrebutted] *prima facie* case that the Department's employment practices were discriminatory in violation of Title VII" (Arado Pet. App. A15). The court of appeals also held that the fixed percentage requirements were not an abuse of discretion, but "were necessary in view of the City's recalcitrance in voluntarily taking steps to correct the racial and sexual imbalances within the Police Department" (Arado Pet.

App. A32). The court vacated the portion of the order which permitted the City to make permanent the temporary promotions to sergeant (*id.* at A36).[8]

After the issuance of the mandate, the petitioners in No. 76-1390 (hereinafter "the Adams petitioners"), representing the class of persons who had been given the temporary promotions, filed a petition in the court of appeals to recall the mandate, for intervention, and for reconsideration. The court of appeals denied the petition and other subsequent requests for similar relief.[9]

ARGUMENT

1. The Arado petitioners contend that unlawful discrimination by an agency of state government under Title VII cannot be shown "without proof of purposefully discriminatory acts" (Arado Pet. 2, 6). In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, this Court emphasized that the thrust of Title VII was directed "to the consequences of employment practices, not simply the motivation." See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 136-137. Congress repeatedly indicated its approval of the *Griggs* rationale during its consideration of the 1972 Amendments to Title VII. See, *e.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess. 5, 14 (1971). Congress also explicitly expressed its intent to afford employees of local governments "the same benefits and protections in equal employment as the employees in the private sector of the economy." S. Rep. No. 92-415, *supra*, at 9.

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[8] The City of Chicago did not file a petition for a writ of certiorari, but has filed a brief in No. 76-1380 which is styled Brief of Respondents City of Chicago, et al., in Support of Granting a Writ of Certiorari (hereafter Chicago Brief).

[9] The Adams petitioners also filed a request for *en banc* reconsideration of that petition and a petition for intervention for the purpose of filing and/or opposing a petition for a writ of certiorari. Both petitions were denied. On March 11, 1977, they filed an unsuccessful petition in the district court for emergency relief and for leave to intervene. The denial of that petition was affirmed on appeal, No. 77-1387 (C.A. 7), June 21, 1977.

Congress' enlarged power under the Civil War Amendments and its authority to choose appropriate means to secure the protections of the Fourteenth Amendment have been repeatedly recognized by this Court. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445; *South Carolina* v. *Katzenbach*, 383 U.S. 301; *Oregon* v. *Mitchell*, 400 U.S. 112. The application of the full Title VII remedy to the states does not interfere with any attribute of state sovereignty and is an appropriate exercise of congressional power based upon a factually supported determination of need. See Brief for the United States in *Hazelwood School District* v. *United States*, No. 76-255, decided June 27, 1977, slip op. 54-58.[10]

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[10]Contrary to petitioners' suggestion (Arado Pet. 7), the decision of this Court in *National League of Cities* v. *Usery*, 426 U.S. 833, does not indicate that public and private employers should be subject to different substantive standards under Title VII. In *National League*, this Court held that there were certain attributes of state sovereignty that are constitutionally insulated from congressional exercise of the commerce power. Title VII, although having a basis in the commerce power, provides a remedy in situations where it is alleged that the state has violated its obligation under the Fourteenth Amendment not to discriminate on the basis of race or other improper criteria. Recognizing this difference, most federal courts have concluded that the portions of the Fair Labor Standards Act that have a basis in the Fourteenth Amendment may be constitutionally applied to the states, even though *National League* struck down those portions of that Act that were based on the commerce power alone. See, *e.g.*, *Usery* v. *Allegheny County Institution District*, 544 F. 2d 148 (C.A. 3), certiorari denied, No. 76-1010, March 28, 1977.

Moreover, Title VII does not involve any interference with the discretion of state and local governments to determine the number of employees they will hire, the functions they will perform, the hours they will work, or the wages they will be paid. The states' ability to determine for themselves the structure and functions of government is unimpaired. Title VII is no more than a proper legislative measure to ensure that states and their subdivisions will not discriminate—subtly or otherwise—on the basis of race or other improper criteria.

In any event, petitioners' contention that absent proof of purposeful discrimination Title VII is not an appropriate exercise of congressional power over state and local governments (Arado Pet. 6-8)[11] was not advanced in either court below and therefore is not properly presented here.[12] See, *e.g.*, *Duignan* v. *United States*, 274 U.S. 195, 200.

2. Petitioners claim that the district court's application of Equal Employment Opportunity Commission Guidelines established an irrebuttable presumption of unlawful discrimination based upon the disproportionate performance of black and white police officers in taking the 1973 sergeant's examination (Arado Pet. 10-15). However, no irrebuttable presumption was imposed; petitioners simply failed to meet accepted standards for test validation. As the court of appeals stated, "[t]he district court found that the validity studies offered by defendants failed to comply with the requirements of the EEOC guidelines and APA [American Psychological Association] Standards for test validation and that defendants' experts failed to establish that any of the selection and promotion devices

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[11]This Court has declined on two recent occasions to consider this question, once because it was not raised in the district court (*Dothard* v. *Rawlinson*, No. 76-422, decided June 27, 1977, slip op. 1, n. 1) and once because the issue was not squarely framed by the facts (*Hazlewood School District* v. *United States*, No. 76-255, decided June 27, 1977, slip op. 6-8, n. 12).

[12]In addition, since the decision is based in part upon violations of the non-discrimination provision of the State and Local Fiscal Assistance Act of 1972, 86 Stat. 932, 31 U.S.C. (Supp. V) 1242, as amended by Pub. L. 94-488, 90 Stat. 2350, 2354, and the power of Congress to place reasonable restrictions upon the use of federal funds by the recipients, the outcome of this case probably would not depend upon the resolution of the Fourteenth Amendment issue raised by petitioners. See 90 Stat. 2354, 31 U.S.C. 1242(g).

were demonstrably job related" (Arado Pet. App. A-18). The court of appeals upheld the district court's findings (*id.* at A-19), and further review is not warranted, since "[a] seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214.

There is no colorable showing of exceptional error here. The propriety of utilizing Equal Employment Opportunity Commission guidelines was recognized by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, 431. These guidelines are entitled to deference; they reflect the holding of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, that "employment tests that are discriminatory in effect" are prohibited under Title VII unless they have " 'a manifest relationship to the employment in question.' " *Albermarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425.

Here, petitioners' evidence failed to satisfy the basic professional standards of any recognized method of employment test validation.[13] Petitioners rely upon a study

[13]Although the Arado petitioners argue that the examination has "construct validity" (Arado Pet. 12-13), the evidence introduced in the district court related solely to criterion-related validity and content validity (Arado Pet. App. A24-A25). Contrary to the City's assertion (Chicago Brief 8-10), the courts below did not require that any particular method of validation be used. Instead, both courts found that the defendants failed to demonstrate the validity of the sergeant's examination under either of the methods upon which they chose to introduce evidence.

This Court referred to the professional standards of the American Psychological Association, which the Guidelines endorse, for definitions of basic methods of test validation. *Washington* v. *Davis*, 426 U.S. 229, 247, n. 13. As described there, criterion-related validity is demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified. Content validity is demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant.

conducted for purposes of this litigation by the Director of the City's Civil Service Commission that is claimed to demonstrate criterion-related validity. The district court found, however, that the sample group of incumbent sergeants to whom the examination was administered were not representative of the candidates for the position, 29 C.F.R. 1607.5(b)(1), that the criterion chosen by the city with which performance on the examination was to be correlated was not itself a reliable indicator of job performance,[14] 29 CFR 1607.5(b)(3) and (c)(1), and that results of the study did not show a statistical or practical significance between performance on the written examination and performance on the job, especially for minority individuals, 29 C.F.R. 1607.5(b)(5), (c)(1) and (c)(2). 385 F. Supp. 543, 559; Arado Supp. Pet. App. A131-A132. These findings were upheld by the court of appeals.

Similarly, the district court found that the content validity claim was seriously undermined because the average successfully performing incumbent sergeant could not answer correctly 47 percent of the questions on the test and would not have made the cut-off point on the 1973 promotional list. 385 F. Supp. at 558 n. 9, 559. The court of appeals, in affirming, held (Arado Pet. App. A27) that the district court could properly conclude "that the evidence of the poor performance of incumbent sergeants on the examination * * * demonstrated that it was not content valid."

The decisions below correctly applied recognized Title VII principles, and petitioners have shown nothing in these factual determinations that would warrant this Court's review.

[14]The district court also based its decision upon the credibility of the defendants' witnesses and statistical studies (see Arado Supp. Pet. App. A127-A130). The court of appeals found those assessments to be supported by the record (Arado Pet. App. A26).

3. The Arado petitioners argue (Pet. 8-10) that the relief ordered by the district court and affirmed by the court of appeals is not authorized by Title VII.

As this Court has consistently recognized, the district court has not merely the power but the duty to render a decree in cases of racial discrimination which will so far as possible eliminate the effects of the past discrimination as well as bar like discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154; *Albemarle*, *supra*, 422 U.S. at 418; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770.

Having found that the defendants had engaged in discrimination under Title VII against blacks, Spanish-surnamed persons, and women in hiring and promotion, the district court framed a decree closely tied to the effects of past discrimination, limited in time, and flexible in its substantive requirements. While the relief is designed to establish and "maintain a sergeant mix reasonably representative of the patrol force" (Arado Supp. Pet. App. A154), it does not require the city defendants to promote anyone who is unqualified or to promote a person less qualified under valid qualification standards. The requirement that 40 percent of the promotions to sergeant go to black and Spanish-surnamed persons is only an interim step, and the court has demonstrated its willingness to alter the numerical requirements imposed by its decree in response to proposals involving non-discriminatory employment standards. For example, in a post-decree order issued September 7, 1976 (420 F. Supp. 733), the district court suspended the hiring (as opposed to promotion) goals required by the final decree and permitted the City to use, in lieu thereof, the results of a new selection device that was shown to have little impact against minorities and that is presently the subject of an ongoing predictive validation

study. The long-term goal is similarly flexible, requiring only that the sergeant ranks be "reasonably representative" (Arado Supp. Pet. App. A154) of the patrol force in race, national origin, and sex. See *Swann* v. *Board of Education*, 402 U.S. 1, 25.

The district court imposed numerical relief here reluctantly, and only after the City failed to devise its own remedy as the court had suggested in its preliminary injunction order in November, 1974 (Arado Supp. Pet. App. A137). The imposition of limited and flexible numerical requirements in the context of the particular factual circumstances present here was well within the discretion of the district court and does not warrant further review.[15]

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[15]In enacting the 1972 Amendments to Title VII, Congress expressly considered the issue of numerical relief under Title VII and rejected attempts to limit the authority of courts to award such relief to remedy the effects of past discrimination. See 118 Cong. Rec. 1661-1676 (1972); *United States* v. *Intern. Union of Elevator Constructors*, 538 F. 2d 1012, 1019-1020 (C.A. 3).

As the petitioners concede (Arado Pet. 10 and cases cited in footnote), the courts of appeals that have considered this issue have approved of the use of numerical goals in shaping a remedy for past discrimination.

The decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420 (C.A. 2), relied upon by the City as creating a conflict among the circuits on this issue (Chicago Brief 7-8) did not involve a Title VII claim. No conflict among the circuits is asserted in the Arado petition. In addition to the cases cited by petitioners, cf. *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (C.A.D.C.).

4. The Adams petitioners seek review of the court of appeals' refusal to permit the city defendants to make the temporary appointments to the rank of sergeant permanent. The court of appeals denied motions by these petitioners for leave to intervene in this litigation that were made after issuance of the mandate, including motions requesting leave to intervene for the purpose of filing this petition (see discussion *supra*, n. 9). The decisions of the courts below denying these petitioners' tardy motion for leave to intervene after the trial of the case, the appellate proceedings, and the issuance of the mandate were well within their discretion and do not warrant review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

DOJ-1977-08

Supreme Court, U. S.
FILED
MAY 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS CITY OF CHICAGO, ET AL., IN SUPPORT OF GRANTING A WRIT OF CERTIORARI

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IN THE

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LOUIS ARADO, et al.,

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Respondent.

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BRIEF OF RESPONDENTS CITY OF CHICAGO, ET AL., IN SUPPORT OF GRANTING A WRIT OF CERTIORARI

Respondents City of Chicago, et al., defendants below, respectfully join with petitioners Louis Arado, et al., and pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 411 F.Supp. 218 (1976). The unreported opinion of the United States Court of Appeals for the Seventh Circuit is reproduced as Appendix A to the petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on January 11, 1977. A Petition for Writ of Certiorari was timely filed pursuant to Title 28, United States Code, Section 1254, on April 8, 1977.

This brief in support of the petition for writ of certiorari is filed pursuant to Rule 21(4) of this Court.

QUESTIONS PRESENTED

1. Whether a violation of Title VII of the Civil Rights Act of 1964, can be sustained absent a showing of intentional discrimination in violation of the Fourteenth Amendment.

2. Whether preferential relief may be granted to minorities by the use of employment quotas absent a finding of constitutional violation.

3. Whether an employment test which is shown to be both content valid and concurrently valid is job-related and lawful under Title VII of the Civil Rights Act of 1964.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case is in conflict with the decisions of this Court in *General Electric Co. v. Gilbert*, ... U.S. ..... 50 L. Ed. 2d 343 (1976) and *Washington v. Davis*, 426 U.S. 248 (1976) and raises issues now before this Court in *Hazelwood School District v. United States*, No. 76-255, certiorari granted 45 U.S.L.W. 3463 (January 10, 1977). It presents important questions regarding the use of employment tests by local governmental bodies and the burdens of proof required both to sustain a violation of Title VII of the Civil Rights Act of 1964 against local governments, and to defend against such a charge. Specifically this case raises the issue of whether an employment test given by a local government, which is shown not to be in violation of the Fourteenth Amendment and is shown to have content and concurrent validity, violates Title VII.

This case also raises the propriety of the use of racial quotas under Title VII where no constitutional violation is present, an issue over which the circuit courts of appeal are in conflict.

ARGUMENT

1. The petition for a writ of certiorari raises important issues regarding the standard of proof required in employment discrimination cases brought against local governments pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Specifically this petition raises the question of whether a local governmental unit can be found in violation of Title VII absent proof that the governmental unit was engaged in intentional racial discrimination in violation of the Fourteenth Amendment. The court of appeals held that although the respondents, City of Chicago, et al., had not engaged in intentional racial discrimination in violation of the Fourteenth Amendment, a violation of Title VII was properly shown. This decision should be reviewed by this court in light of the recent decision of *General Electric Co. v. Gilbert*, ... U.S. ..... , 50 L. Ed. 2d 343 (1976).*

In *General Electric Co. v. Gilbert, supra*, this court considered the question of whether an employee disability plan violated Title VII due to the exclusion of pregnancy as a covered benefit. In reaching the decision that the disability plan did not violate Title VII this Court noted that the Civil Rights Act of 1964 did not specifically define the term discrimination. The court stated that in a determination of discrimination under Title VII "we should not readily infer that it meant something different than what the concept of dis-

* The court of appeals remanded to the district court allegations of sex discrimination raised by plaintiffs on the apparent belief that under *Gilbert* intent is a necessary requirement in sex discrimination cases brought under Title VII. This raises the anomaly of requiring different standards of proof under Title VII in cases alleging sex discrimination as against those cases alleging racial discrimination.

crimination has traditionally meant" under the Fourteenth Amendment. 50 L. Ed. 2d at 360. Thus this Court appears to be saying that the standard of proof required to prove discrimination in a Title VII action is identical to the traditional standard of proving discrimination under the Fourteenth Amendment and, as the decision in *Washington v. Davis*, 426 U.S. 248 (1976), held, a finding that an employment practice results in an adverse racial impact is not sufficient to support a constitutional violation absent a showing of intentional discrimination.

It therefore follows that proof of intentional discrimination is a prerequisite to any finding of a Title VII violation. A recent decision by the district court for the Northern District of Alabama, *Scott v. City of Anniston*, ... F. Supp. ..... .45 U.S.L.W. 2488 (N.D. Ala., 3/31/77), has so held, and this same issue is now before this court in *Hazelwood School District v. United States*, No. 76-255, certiorari granted 45 U.S.L.W. 3463 (January 10, 1977.)

Proof of intentional discrimination should also be required in cases, like the present situation, where plaintiffs' evidence consists solely of the disparity in pass/fail rates on one examination. As this Court noted in *Castaneda v. Partida*, ... U.S. ....., 45 U.S.L.W. 4303 (March 22, 1977) at note 8, statistics showing a racial impact are relevant only if taken over a period of time sufficient to test their reliability. In any one sampling, or any one examination, it is possible and indeed expected that statistical deviations will occur. Such a deviation was held to be insufficent to prove discrimination in *Washington v. Davis*. It is for this reason that plaintiffs must be required to show intentional discrimination. To this effect the Solicitor General, speaking for the United States in *Austin Independent School District v. United States*, ... U.S. ....., 97 S.Ct. 517 (1976), argued that racial disparity in school assign-

ments did not violate the constitution absent a showing that the statistical disparity was caused by state action, presumably requiring some showing of intent.

In addition to this Court's decision in *Gilbert*, it appears that as a matter of federalism under the Tenth Amendment it is necessary for a plaintiff bringing a Title VII action against a governmental unit to prove intentional discrimination. The Civil Rights Act of 1964 was adopted pursuant to the commerce power of Article I, Section 8, of the Constitution. *Heart of Atlanta Motel Inc., v. United States*, 379 U.S. 241 (1964). In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this court held that Congress could not use the commerce power to extend federal control over the terms and conditions on which state and local governments hire, promote, and compensate their employees. Such a federal intrusion would violate the Tenth Amendment. It therefore follows that Congress could not use the commerce power to extend Title VII to local governments. The extension to local governments can only be possible under Section 5 of the Fourteenth Amendment.

Therefore, if Title VII's jurisdiction over the respondents, City of Chicago, et al., in the district court was based on the Fourteenth Amendment the plaintiffs were required, under *Washington v. Davis, supra*, to prove intentional discrimination. The court of appeals decision, decided without reference to *Gilbert*,* should be reviewed by this court to determine these important issues.

2. The district court ordered, and the court of appeals affirmed, the use of preferential hiring quotas for employment in the Chicago police department and authorized the withholding of 114 million dollars in

* Circuit Judge Pell in dissent noted, without further comment, that the decision in *Gilbert* should have been applied by the court of appeals in review of the district court's findings.

revenue sharing funds as a method to enforce compliance with these quotas. Quota relief requires that race be made a factor in hiring decisions for the position of police patrol officer and police sergeant and thus violates the provisions of Title VII of the Civil Rights Act of 1964, as well as the provisions of the Fourteenth Amendment. The circuits are split as to the constitutionality of such relief.

Title VII specifically states that the statute does not authorize preferential relief to any group or person based on race or national origin. 42 U.S.C. § 2000e(6). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this court held that the provisions of Title VII do

> "not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 430, 431.

Race-specific relief was first authorized by this court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) where such relief was found to be within the discretionary powers of a court. However this Court specifically stated that "absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16. This holding was restated in *Milliken v. Bradley*, 418 U.S. 717 (1974), where the Court held that federal remedial power may be exercised "only on the basis of a constitutional violation."

One circuit has rejected the use of quotas as relief in cases brought against public employers for alleged employment discrimination. The Second Circuit in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975), held that the use of quotas for public employment was unlawful reverse

discrimination that violated the Fourteenth Amendment. The *Kirkland* court stated that quota relief would be improper even if a constitutional violation were proven.

The court of appeals' judgment here authorizes the use of race-specific relief absent a finding of constitutional violation. This holding violates the clear language of Title VII and the holding of this Court in *Swann*.

The petition for certiorari at page ten indicates the conflict among the circuits as to the use of quotas in Title VII cases. At least seven circuits approve of such relief. This Court should grant certiorari to determine if such preferential race-specific relief is allowable under either Title VII or the Constitution, an issue currently before this Court in *Regents, University of California v. Bakke*.

3. This case raises an important question regarding the nature of proof required by a defendant to show that an employment examination is job-related. In the present case, the 1973 police sergeant's examination was shown to be both content valid*, i.e., the examination consisted of questions inquiring into the essential knowledge required by the job being tested for, and concurrently valid. The district court as well as the court of appeals rejected these forms of validation because they do not lend themselves to a statistical correlation with job performance. This issue becomes whether the Civil Rights Act of 1964 or the Constitution requires all employment examinations to be validated by a predictive study.

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* The petition for certiorari uses the term construct validity for this method of validation. However, from the argument in the petition it is clear that petitioners rely on the content validity of the 1973 examination.

The Civil Rights Act of 1964 requires that employment tests be job-related. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Equal Employment Opportunity Commission has established testing guidelines which state that employment examinations should be validated by the use of other predictive or concurrent validation techniques. 29 C.F.R. § 1607.5(b). However, in *Washington v. Davis, supra*, this Court recognized that no one specific method of validation is required under the Civil Rights Act and that a relationship between test scores and training was sufficient proof of job-relatedness despite disapproval of this validation method by the E.E.O.C. guidelines. Content validation itself has been accepted by the Second Circuit as an acceptable method of showing that an examination is job-related. *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2nd Cir., 1973).

In addition, the sergeant's examination was shown to be concurrently valid. This validation was accomplished by giving the examination to incumbent police sergeants and statistically correlating their test scores to their performance on the job. The statistical correlations showed that a statistically significant relationship existed between candidate test scores and their job performance. These statistics were unrebutted. Three expert witnesses stated that these correlations were sufficient proof that the 1973 sergeant's examination was job-related.

The court of appeal's requirement that job-relatedness be shown only by proof that the examination predicts actual job performance places upon a defendant a burden of proof far beyond that required under this Court's holding in *Davis*. It requires that a public employer ignore valid test scores and enter into long range predictive validity studies. Such a practice would

not only destroy the civil service requirements of competitive examination but also compromise the safety of the public during the study period as persons possibly unfit for police work are hired solely for purposes of a validation study. For this reason review of this decision is necessary to provide defendants with guidance as to the proper method to use regarding proof of the job-relatedness of employment examinations.

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and for the reasons stated above, it is respectfully requested that this court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May 16, 1977

Supreme Court, U. S.
FILED
MAY 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY ISAKSON-INTERVENOR DEFENDANTS

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY ISAKSON-INTERVENOR DEFENDANTS

Isakson intervenor-defendants file this Response to the Petition for Writ of Certiorari filed by Louis Arado, et al., and support the request that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions by the United States District Court for the Northern District of Illinois, and by the United States Court of Appeals for the Seventh Circuit are as set forth in the Petition for Writ of Certiorari filed herein.

QUESTIONS PRESENTED

Petitioners have briefed the following questions in their Petition for Writ of Certiorari:

1. Whether either Title VII of the Civil Rights Act of 1964 or the Constitution authorizes a federal district court to order an agency of state government to engage in racial quota hiring, absent proof of purposeful racial discrimination.

2. Whether Congress authorized the use of racial or ethnic quotas under Title VII of the Civil Rights Act of 1964 as a remedy for unlawful discrimination.

3. Whether the District Court's use of the guidelines of the Equal Employment Opportunity Commission establishes a rule that mere disproportion in the performance of black and white police officers taking a promotional examination is conclusively and irrebuttably presumptive of unlawful discrimination.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the Constitutional provisions and statutes set forth in the Petition for Writ of Certiorari, the following are pertinent:

Section 2, Article 4 of the Constitution of the United States:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Title 42, U.S.C. § 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

As set forth in the Petition for Writ of Certiorari, this case consolidates a number of originally separate actions which challenge on both constitutional and statutory grounds, various employment practices of the Chicago Police Department. The suit brought by the United States in August, 1973, alleged patterns and practices which allegedly discriminated against blacks, hispanics, and women, in hiring, assignment, promotion, and discipline. The Petitioners in this matter intervened as party defendants on behalf of Chicago Police Department Officers who had passed an examination which would place them on a list for promotion to Sergeant. Roy Isakson, Fred Sansone, Robert Buckner, Larry Payne, Martin Leal, and George Flood were granted leave to intervene on behalf of those men who had passed a civil service examination which made them eligible to be hired as patrol officers, the entry level position in the Department of Police of the City of Chicago.

In its final decision on February 2, 1976, the District Court found that the City of Chicago had discriminated in promotion to the rank of Sergeant which is the basis of the Petition for Writ of Certiorari herein. In that same decision, the District Court found also that the City had discriminated in hiring of persons to the position of patrol officers. The District Court in this decision established a racial and ethnic quota for Sergeants' promotions, and also for hiring of patrol officers.

As set forth in the Petition for Writ of Certiorari, on January 11, 1977, the United States Court of Appeals for the Seventh Circuit affirmed this decision in most respects, upholding the imposition of racial and ethnic quotas as a remedy for the discrimination which had been found. At the same time, the Court of Appeals held that there was no evidence that the Chicago Police Department had engaged in purposeful discrimination.

REASONS FOR GRANTING THE WRIT

While the parties filing this response to the Petition for Writ of Certiorari are not directly attacking the ruling of the District Court, as affirmed by the Court of Appeals, setting quotas regarding hiring of patrol officers by their own petition for certiorari, since that portion of the decree directly relating to them has been vacated by the Court of Appeals, they do believe that this Court should grant the Petition for Writ of Certiorari herein to decide the very important issues which are presented in that petition.

As pointed out in the Petition for Writ of Certiorari herein, § 703(j) of Title VII forbids the use of preferential hiring policies to change the racial balance of an employer's work force. This was recognized by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 91 S.Ct. 849 (1971). Yet, the District Court sought to impose quotas for future hiring and promotion to change the racial balance of the work force of the Department of Police of the City of Chicago. This ruling flies directly in the face of the statutes sought to be enforced and the Constitution. This Court must authoritatively determine whether the Constitution means what it says or whether some classes of persons are to be more equal than others.

Since the founding of this country, it has been a philosophical goal constantly sought to be attained that "all men are created equal", as it is expressed in the Declaration of Independence. The history of our country has showed a steady attempt to secure this idea. Section 2, Article 4 of the Constitution decrees that "the citizens of each state shall be entitled to all privileges and immunities as citizens in the several states." The

Fourteenth Amendment likewise provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In furtherance of that mandate, Title 42 U.S.C. § 1981 was passed providing that all persons were to have the same right in every state to enforce contracts, to sue, to give evidence, and "to the full and equal benefit of all laws and proceedings for the security of persons and property."

This case presents the question whether that principle of equality is to be applied to all citizens of this country. This case squarely presents the issue of whether equal protection applies to the majority as well as the minority. Must the federal courts abide by the same rules which they would impose upon the states? The decision on this issue has ramifications far beyond this specific fact situation. The issue is whether the Fourteenth Amendment means what it says. As was said by this Court in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958):

> "The Constitutional provisions [of the Fourteenth Amendment], therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning . . . Thus, the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the state taking the action . . . or whatever the guise in which it is taken . . .".

It is submitted that the only view which can be taken under our constitution is that which was put forth most eloquently by the first Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 41 L.Ed. 256 (1896):

> "But in view of the constitution, in the eye of the law there is in this country no superior, dominant, ruling class of citizen. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the Supreme Law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race."

Surely, the Constitution cannot mean that there can be no discrimination against minority groups but that there can be discrimination against the majority. Indeed, a holding that any hiring or promotion plan which is based upon race or ethnic background is certain to flounder as it will require the courts to engage in untold decisions as to who does and who does not belong to various groups. In addition, determinations will be required to be made as to what groups of what backgrounds are entitled to preferential treatment in varying situations.

This case presents a perfect example of the mischief inherent in such classifications. One of the classifications utilized by the District Court, and approved by the

Court of Appeals is that of "Spanish-surnamed males". The policy behind the selection of such classification is difficult to perceive. Such class includes no homogeneous, easily identifiable group, but encompasses a myriad number of persons with completely diverse backgrounds coming from Spain, Puerto Rico, and virtually all of the countries of South America. It includes those who may by accident of birth have acquired a Spanish surname, assuming that we may be able to identify such a classification with any reasonable degree of certainty.

The unreasonableness of such a classification is patent. It makes no difference under this classification whether the applicant's "Spanish" heritage is 100%, 50%, 25%, or less, so long as by accident of birth his surname happens to sound "Spanish". Similarly, with black persons. Who qualifies as a black person? The setting of such a quota assumes that black males are fungible, which, of course, is not true. Again, we must recognize that there are different degrees of "blackness". What of a person, one of whose parents was black, and one white? Into what category does he fall? Does his selection depend upon the darkness of his skin, or upon his cultural bent? Must we again be faced with a determination of what constitutes "Black"?

To state the problem is to make obvious the fact that quotas are not only ideologically and philosophically wrong, but also undefinable as a matter of practicality. Our society is a pluralistic one, made up of a great cultural and ethnic mix. Once one begins setting quotas, where does one stop? Must public employment, such as in a police department, reflect the racial and ethnic mix of the entire city? Why are certain ethnic and racial groups chosen for special consideration? What of those of

Polish ancestry, or American Indians, or Orientals? Would they not all be entitled to claim proportionate representation on the Chicago Police force?

To state the problem is to show that the approach taken by the courts below is wrong. This country was founded upon the proposition that it is the worth of the individual which is paramount. We are not a country of castes and discrete classes. We are a nation of individuals, each of whom is entitled to be judged upon his own merit, not his class or background. This court should take this case to emphasize that *no one*, be he black, white, yellow, or anything else, should be discriminated against because of that accident of birth. No one has the right to impose such a classification, be he employer, union, administrative agency, or judge.

This Court has declared that State action employing a racial classification is "constitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative standard." *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1974). The same must apply to judicially imposed standards.

The Constitution and the entire philosophical history of our country cries out against discrimination of any kind, in favor of or against anyone. Discrimination on the basis of background is improper in every respect, be it privately or publicly imposed. Quota systems must not be sanctioned. This Court should squarely face that issue which is presented in this case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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